DOCUMENT RESUME

ED 337 851 EA 023 353

AUTHOR	Rossow, Lawrence F.; Parkinson, Jerry
TITLE	The Law of Teacher Evaluation. NOLPE Monograph/Book Series No. 42.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
REPORT NO	ISBN-1-56534-031-0
PUB DATE	92
NOTE	86p.
AVAILABLE FROM	Publication Sales, National Organization on Legal Problems of Education, 3601 S.W. 29th, Suite 223, Topeka, KS 66614 ($17.95 plus $3.00 postage and handling).
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Compliance (Legal); Court Litigation; Elementary Secondary Education; *Evaluation Criteria; Evaluation Utilization; Job Performance; *Legal Problems; Libel and Slander; State Standards; *Summative Evaluation; Teacher Dismissal; *Teacher Evaluation; Test Validity

ABSTRACT

Litigation in the area of teacher evaluation has developed around issues concerning the processes and criteria used by school districts in conducting evaluations. Following an introduction explaining basic concepts, chapter 2 discusses the appropriate content of teacher evaluation, examining formal adoption of evaluation policies, compliance with state statutes and regulations, and content and constitutional requirements. Chapter 3 focuses on the use of commonly recognized statutory grounds for terminating teachers and the part these grounds play in evaluation. The procedural aspects of evaluation, such as the use of objective criteria and remediation, are described in chapter 4. The fifth chapter discusses the use of competency testing, issues of test validity, potential constitutional challenges, discrimination, and miscellaneous legal considerations. Issues in teacher evaluation and defamation claims are examined in the final section, presenting lines of defense available to administrators to protect against such claims. A conclusion points to the pervasive attitude of judicial deference to the decisions of educational policymakers. (317 footnotes) (LMI)

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The Law of Teacher Evaluation

Lawrence F. Rossow and
Jerry Parkinson

NOLPE

No. 42 in the NOLPE Monograph/Book Series

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NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION
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ISBN 1-56534-031-0

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Table of Contents

I.

Introduction and Basic Concepts 1

II.

Content of the Evaluation - What May be Assessed? 3
- A. Formal Adoption 3
- B. Compliance with State Statutes and Regulations 3
- C. Content and Constitutional Requirements 5
  - 1. Avoiding Vagueness 5
  - 2. Avoiding Free Speech Violations 5
    - a. General Principles 5
    - b. Applying the Legal Principles 7
      - Criticisms of Authority 7
      - Union Activities and Evaluations 8
    - c. Concluding Recommendations for Avoiding Free Speech and Other Protected Activity Problems 10
  - 3. Student Progress as an Evaluation Criterion 10

III.

The Role of Evaluation in the Termination Process 13
- A. Sufficiency of Evidence 13
- B. Incompetence 14
  - 1. Student Control Problems 15
  - 2. Poor Instructional Performance 16
- C. Immorality 19
  - 1. Dishonesty 19
  - 2. Sexual Misconduct 20
- D. Insubordination 24

IV.

Procedural Aspects of an Evaluation 27
- A. Using Objective Criteria 28
- B. Remediation 30

V.

The Use of Testing in the Evaluation of Teachers 33
A. Test Validity 34
B. Potential Constitutional Challenges to Teacher Testing 39
1. Impairment of Contract 39
a. Existence of a Contract 39
b. Impairment of the Contract 42
c. Reasonableness of the Impairment 42
2. Procedural Due Process 44
a. Liberty Interest 44
b. Property Interest 45
c. What Process is Due? 48
3. Substantive Due Process 52
4. Equal Protection 54
C. Testing and Discrimination 58
1. Title VII: Racial Discrimination 58
a. Disparate Impact 59
b. Job Relatedness 60
c. Availability of Alternative Measures 63
2. Discrimination Against Persons with Disabilities . 64
3. Age Discrimination 67
D. Miscellaneous Legal Considerations 68

VI.

Teacher Evaluation and Defamation 69
A. Truth as a Defense 69
B. Privilege/Immunity 70
C. Abuse of the Privilege/Malice 72
D. Fact v. Opinion 75
E. Conclusion Regarding Defamation 77

I.
Introduction And Basic Concepts

Since the beginning of formal public education in America, teachers have been evaluated in some way or another by school authorities. Through time the evaluation process became more formalized. With the formalization of the process came a heightened awareness of the potential losses teachers could incur by negative evaluations. As a form of protection against terminations or other negative employment decisions, teachers began to use the law. Most teachers now enjoy a variety of state statutory procedures to which the administration must adhere when evaluating teachers. In addition several common law and constitutional law doctrines serve to protect teachers undergoing evaluations.

Litigation in the area of teacher evaluation has developed around issues concerning the processes and procedures used by school districts in conducting evaluations. Even more basic arguments have surrounded the criteria used by school authorities in establishing the evaluation system. This monograph will attempt to describe the problems both teachers and school administrators have had with the evaluation of teachers. Perhaps an understanding of how those unresolved problems were eventually settled by the courts can help guide future practice.

Some basic concepts must be discussed at the outset. First, the evaluation of teachers is not confined to classroom teaching activities. The evaluation of teachers has legally included areas other than teaching. Many of these "ultra teaching" areas could be grouped into a category called *interpersonal and organizational relationships*.[1] Examples of this category include relationships with fellow teachers, cooperation with administration and relationships with parents. The evaluation might even include some consideration of teacher behaviors totally unrelated to the teaching process. Examples of these areas include assessment of standing in the community, outside employment or even personal behavior.

The second concept important to the understanding of the law of teacher evaluation is that there are two types of evaluations—*formative and summative*. Formative evaluations are conducted for the purpose of improving teaching. These evaluations often are conducted with the help of such "scientific" approaches as *clinical supervision*. Summative evaluations are

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1. Clear, Delbert K. and Box, John M., Justiciable Performance Standards for Discharging Incompetent Teachers, Paper Presented at the Annual Meeting of the National Organization on Legal Problems of Education (30th, Williamsburg, Virginia, December 8, 1984).

conducted primarily for the purpose of developing records which can be used to justify continuing or terminating the employment of the teacher. These evaluations are typically conducted by the teacher's immediate supervisor with the aide of a rating instrument.[2] Because the summative evaluation often is the basis for negative employment decisions, the law of teacher evaluation concerns the issues surrounding this type.

2. C. Glickman, SUPERVISION OF INSTRUCTION, 233 (1985).

II.
Content of The Evaluation — What May Be Assessed

A. Formal Adoption

Before discussing the scope of the evaluation itself, it should be noted that the school district needs to indeed have an evaluation policy. The policy must be written in understandable language and reviewed by the teachers before it is implemented and published. Failure to establish an evaluation policy with clearly defined standards of performance leaves school authorities open to the charge of arbitrary and capricious conduct. The suspicion of arbitrary conduct brings with it the potential judicial conclusion that the administration keeps its evaluation standards hidden in order to discriminate against teachers.

As an example, a Washington appellate court ruled that the evaluation of a principal by the superintendent was invalid. The board of education had not adopted any criteria for evaluating principals. Thus, the superintendent's notification that the principal was deficient in fifteen performance areas was considered arbitrary.[3] In the words of the court:

> In the absence of established criteria, the principal serves at the whim and pleasure of the superintendent. The principal has no guidelines against which to measure his or her performance and may thereby be deprived of a legitimate opportunity for improvement.[4]

B. Compliance with State Statutes and Regulations

In the decision just discussed, the state had at the time of the case, statutes which required that school boards develop and adopt criteria for the evaluation of personnel. Therefore, in addition to being arbitrary, the lack of action of the board to establish criteria also violated state statutes. Failure to establish some evaluative criteria present statutory violations in most states. Over half of the states have enacted laws pertaining to teacher evaluation.[5]

The specificity of the states' evaluation statutes vary widely. Some states require only that local boards adopt some policy leaving the details to local schools.[6] Other states provide no flexibility and mandate all aspects

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3. Hyde v. Wellpinit School Dist. No. 405, 611 P.2d 1388 (Wash. Ct. App. 1980), *cert. denied* 648 P.2d 892 (Wash. 1982).
4. *Id.* at 1391.
5. M. McCarthy and N. Cambron-McCabe, Public School Law, 254 (1987).
6. *See, e.g.* Iowa Code Ann. sec. 279.14 and Ark. Stat. Ann. 80-1266.6.

of the evaluation process by statute.[7] Most states' procedures fall somewhere between with legislatures taking the opportunity to mandate certain aspects of the process and leaving other aspects to local boards.[8]

Where there are no state statutes pertaining to teacher evaluation, the state board of education may require that certain criteria and/or procedures be used. For example, while the statutes of Oklahoma require specific procedures be used in the evaluation of teachers, the state board of education decides on the performance criteria.[9]

In addition to the state statutes and the state board regulations, the local school board must comply with any negotiated agreement that may exist with the teachers' bargaining representative. The master contract between the board and the teachers' union often contain some provisions concerning teacher evaluation.

When statutes, state board regulations or negotiated agreements specify standards regarding teacher evaluation, the courts have generally held local boards to strict compliance. In West Virginia, an appellate court invalidated the disciplinary transfer of four teachers from an elementary school because the local board had not followed the state board policy regarding an evaluation. The policy required that a disciplinary transfer be based upon the regular performance evaluation of the teacher. In addition the policy stated that the teacher had to be given the opportunity to improve performance.[10]

When local boards have carefully followed evaluation requirements, the courts have held for school authorities. If the stipulated procedures are followed, the courts will be unwilling to substitute their judgment for the judgment of educators when teachers challenge an evaluation rating. In an illustrative case, a Department of Defense teacher had been dismissed for failure to correct cited performance deficiencies. The deficiencies included failure: (1) to maintain a gradebook; (2) to develop a written grading system; (3) to submit required course outlines; and (4) to prepare lesson plans which included learning objectives.[11] The teacher claimed that the criteria were invalid because they did not inform him of what was necessary to achieve a satisfactory rating. In holding for the school, the court opined that although the standards did require some subjective evaluation, they were sufficiently objective and precise in the sense that most people would understand what was required.[12]

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7. *See, e.g.* Pa. Stat. Ann. 24 sec. 11-1123 and La. Rev. Stat. Ann. sec. 17.391.5.
8. *See, e.g.* Cal. Educ. Code sec. 44660, sec. 44662 and sec. 44664 and Fla. Stat. sec. 231.29.
9. Okla. Stat., tit. 70 §§6-102.2, 6-102.3, see also West Virginia Bd. of Educ. Policy No. 5300 (6) (a).
10. Holland v. Board of Educ. of Raleigh County, 327 S.E.2d 155 (W. Va. 1985).
11. Rogers v. Department of Defense Dependents School, Germany Region, 814 F.2d 1549, 1551 (Fed. Cir. 1987).
12. *Id.* at 1553.

C. Content and Constitutional Requirements

1. Avoiding Vagueness

In order for the content of an evaluation to withstand a constitutional challenge that it is void for vagueness or irrelevancy, there are several conditions that should be met. First, the criteria used in the evaluation should be rationally related to state objectives. Second, the administration should be able to show how each criterion is related to the job of teaching.

While objective criteria in the evaluation are more easily defended, subjective factors may be included as previously noted. An example of an objective criterion is: "*teacher started class on time.*" A subjective criterion is: "*teacher used clear explanations.*" The use of the objective criterion merely requires that the evaluator check the clock as the class begins. The subjective criterion requires discretionary judgment. What may be a clear explanation to one evaluator may not be to another. However, what is important is not whether the criterion is objective or subjective but whether the behavior is validly related to the requirements of the job and can be observed.

Consistent with these principles, a federal district court held for a Missouri school district that failed to promote a special education teaching assistant to teacher because of deficient evaluations.[13] The assistant had been rated unsatisfactory on criteria which included: (1) oral and written communication skills; (2) interpretation of diagnostic instruments; (3) ability to work with behavioral and learning problem students.[14] The plaintiff brought action under 42 U.S.C. Sec. 1983 of the Civil Rights Act and argued that the criteria operated as a pretext for the school district to discriminate against her as a member of a racial minority. In rejecting the claim, the court noted that the criteria used by the school district were applied in an even handed manner by two separate interviewers on several different occasions.

2. Avoiding Free Speech Violations

a. General Principles

A school district may not base a negative employment decision on the teacher's exercise of free speech rights. As far back as 1968, the United States Supreme Court in *Pickering v. Board of Education*[15] ruled that teachers have the right to air their views on *matters of public concern*. The Court noted that there was no justification for limiting teachers' contri-

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13. Love v. Special School Dist. of St. Louis County, 606 F. Supp. 1320 (E.D. Mo. 1955).
14. *Id.* at 1323.
15. 391 U.S. 563 (1968).

bution to public debate. The Court viewed the role of teachers as providing a special vantage point from which to formulate an informed opinion on school issues.[16] However in addition to the speech being a matter of public concern, teachers' views should not be directed at a person with whom there is daily contact (such as the principal) nor should the speech cause disruption in the working environment.[17]

An additional dimension was added to the *Pickering* criteria in 1977 when the Court decided *Mt. Healthy City School District v. Doyle*.[18] In Mt. Healthy, a nontenured teacher telephoned a radio station to criticize a dress code proposal for teachers. The teacher, Doyle, had previously been involved in altercations for which he was disciplined. Incidents leading immediately to his dismissal included: arguing with school cafeteria employees about the amount of spaghetti which had been served him, referring to students in connection with a disciplinary complaint as "sons of bitches", and making an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Doyle challenged his dismissal as an impermissible curtailment of his right to free speech. In addition to the *Pickering* standards, the Court asked whether the teacher could show that his free speech was a substantial factor in the board's decision to terminate him. A positive answer then triggers the need for the authorities to show by a preponderance of evidence that the board would have reached the same decision to terminate absent the protected speech. The case was remanded for determination by the district court. The district court held for the school district and the United States Court of Appeals for the Sixth Circuit affirmed.[19]

Finally, in 1983 the United States Supreme Court added to the *Pickering* and *Mt. Healthy* standards when it decided *Connick v. Myers*,[20] a noneducation case. In *Connick*, a public employee was terminated when she distributed questionnaires in the office that were critical of the supervisor. In upholding the termination it was concluded that the questionnaire was mostly about the employees concerns regarding her own job. The Court noted that the burden on the employer to justify a termination based on some speech activity will vary according to the nature of the employee's speech. The more the speech involves issues of public concern, the more protection has the employee. The more the speech interferes with close working relationships, the less protected is the employee.[21]

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16. *Id.* at 572.
17. *Id.* at 572-573.
18. 429 U.S. 274 (1977).
19. *Id.* at 285-286.
20. 461 U.S. 138 (1983).
21. *Id.* at 150.

To summarize the legal principles, a teacher should not be given a negative evaluation based on his or her exercise of free speech. It should be assumed that a teacher is protected unless there exist some conditions that counterbalance the otherwise protected speech. These conditions are: (1) the speech is purely personal in nature; (2) the speech produces disruption in the smooth running of the school; or (3) the employee would have been dismissed for existing legitimate reasons.[22] It should be noted that the principles governing the protection of teachers in the free speech area apply to other fundamental freedoms. Other freedoms include the freedom of association and the right of redress of grievance.

b. Applying the Legal Principles

Criticisms of Authority

Given the principles just discussed, caution should be used when evaluation criteria call for assessment of various aspects of communication. Especially, questionable are items that ask for an assessment of the teacher's "attitude" or how the teacher "cooperates with the administration" or "gets along with others?" The use of criteria such as these in response to teacher's criticisms, has invited litigation.

For example, in *Knapp v. Whitaker*[23] a high school biology teacher and coach was awarded over $200,000 in damages when he was involuntarily transferred to a grade school. The court found evidence to support the claim that the board's decision was in part based on negative evaluations which were traced to the teacher's exercise of free speech. The principal had recorded the following on the teacher's evaluation:

> Mr. Knapp is very enthusiastic and intense in both his teaching and coaching. He does have, however, a tendency at times to be too opinionated and outspoken.[24] (emphasis added)

When the court gave instructions to the jury in the *Knapp* case, it synthesized the *Pickering, Mt.Healthy* and *Connick* standards for an accurate application. The judge directed that the jury ask itself: (1) Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants decision to give the plaintiff negative evaluations?; and (2) would the defendants have taken the same action if the plaintiff had not engaged in the constitutionally protected conduct?

However school authorities have successfully defended against charges of free speech violations when the teacher's speech is found to be only tangentially related to matters of public concern. *Ferrera v. Mills*[25], was

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22. For thorough discussion of the constitutional rights of teachers, see L. Rossow, The Principal and the Law in The Principalship Dimensions in Instructional Leadership, 186-277.

23. 757 F.2d 837 (1985).

24. *Id.* at 837.

25. 596 F. Supp. 1069 (S.D. Fla. 1984).

brought by a Florida high school teacher who had been outspoken in his criticism of a number of school policies. These criticisms where directed at subjects such as class assignments, students' selection of their courses and teachers, and hiring of coaches to teach in the social studies department. As a result of these open criticisms, the teacher received an evaluation which in part noted: "Mr. Ferrera does not have an effective relationship with associates. He complains about assignments."[26] While these criticisms might appear to be issues of public concern and as such protected speech, the court ruled:

> A review of the entire record convinces the court that plaintiff's speech, while tangentially related to matters of public concern, constitutes nothing more than a series of grievances with school administrators over internal school policies.[27]

Union Activities and Evaluations

Teachers have often been successful in suing school boards when their union activities have resulted in negative evaluations. In *Hickman v. Valley Local School District Board of Education*,[28] an elementary school teacher had been active in the local teachers' organization for a period of three years prior to her termination. The court noted that as her union activities increased so did her low evaluations in the "intra-school relationships" and "professional ethics" components of the evaluation. The local board used her evaluations as justification for her termination. The question before the court was whether a cause of Hickman's termination was the administrator's disapproval of some of her union activities. In the court's view:

> The alleged personality conflict between Hickman and Chestnut germinated from her union activities. . . . Most importantly, many adverse comments on the evaluations concern criticism of her union activities, providing direct evidence connecting low evaluations with Chestnut's disapproval of her union activities. . . . [T]he defendants' reasons for nonrenewal, on their face are closely linked with, and colored by, their reactions to Hickman's protected activities.[29]

Several years later, the United States Court of Appeals for the Eighth Circuit held for a public school teacher who was dismissed for the alleged use of improper language. The teacher was the president of the union when it filed charges of unfair labor practices against the school district. The record showed that the superintendent had hostility toward union activities by teachers. He made threats to retaliate and used restrictive mea-

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26. *Id.* at 1071.
27. *Id.*
28. 619 F.2d 606 (6th Cir. 1980).
29. *Id.* at 609.

sures against the teachers. The court found that the teacher's negative evaluation involving the use of "improper language" was a pretext and that the teacher was in fact dismissed because of her union activities.[30]

Consistent with the Supreme Court standards discussed earlier, school boards have been successful in defending against charges of free speech and association violations of union members when the activities do not play a substantial part in the evaluation. Also under *Mt. Healthy*, the board must show that it would have made the same decision absent the protected activities. One such board success arose in *Reichert v. Draud*.[31] A Kentucky teacher was serving as the president of the local teachers' union when the administration changed her teaching schedule for the forthcoming year. The teacher claimed that the change was motivated by her union activities. However, the court noted that there were legitimate personnel reasons for the decision. One such reason was financial exigency as the board was faced with budget problems. Based on an outside consultant's recommendation that certain elective courses from the curriculum be eliminated as a cost-savings technique. The board changed her teaching assignment from psychology to English.

The court held that:

> [P]rotected First Amendment conduct of appellant did not play a substantial part in the decision to change her teaching schedule. The same decision would have been made by the appellee school officials if the incidents involving the exercise of appellant's asserted First Amendment rights had not occurred.[32]

A Texas school district was also successful in defending its decision when the president of the state teachers' union sued charging free speech violations. In *Montgomery v. Trinity Independent School District*[33] a teacher opposed a tax rollback that the school district had wanted. When the measure was defeated, the school district had to engage in a reduction-in-force. The board decided to use teacher evaluation scores to determine which teachers would be released. Montgomery and seven other teachers were given nonrenewal notices.

In her suit Montgomery asserted that the real reason her contract was not renewed was because of her outspokenness as the union president. On the teacher's behalf, a board member testified that it was "his opinion that Mrs. Montgomery had been dropped because of her union activities."[34] However, the court concluded that "because no facts were presented in

30. Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984).
31. 701 F.2d 1168 (6th Cir. 1983).
32. *Id.* at 1171.
33. 809 F.2d 1058 (5th Cir. 1987).
34. *Id.* at 1062.

support of these expressions of opinion,"[35] only a colorable constitutional claim was made. The teacher was obligated to present something more than a theory that permits speculation.

c. Concluding Recommendations for Avoiding Free Speech and Other Protected Activity Problems

A major problem with items in an evaluation instrument that call for an assessment of "attitude" or elements of "cooperation" is that they can implicate a free speech issue. Teachers who most often openly exercise their free speech are the same ones who receive low marks on the cooperation type criteria. School officials should ask themselves how essential it is to assess teachers' attitudes. More importantly they should avoid punishing them for attitudes with which they disagree. Otherwise, litigation could follow.

It should be noted however that usually the board must terminate, demote, transfer or make some negative employment decision in order for the teacher to state a claim. Less points being awarded or negative comments remaining in the record does not necessarily lead to a judgment against the board. The teacher must show some kind of injury.

A final caveat is in order. Teachers have free speech protection regardless of their tenure status. In otherwords, whether the teacher is a first-year novice or a twenty-year veteran has no bearing on the right to be protected by the first amendment. The evaluator should proceed with caution when assessing performance that involves their speech or other types of protected activity.

3. Student Progress as an Evaluation Criterion

As early as 1973, the courts considered whether using student test scores to evaluate teachers was a violation of due process.[36] In this first case, an Iowa teacher's contract was not renewed because the administration found no improvement in the achievement test scores of her students. The teacher asserted that the use of student test scores had no support in educational policy and therefore denied her substantive due process. In addition, the teacher claimed that the school administration failed to interpret the tests properly and that her students actually showed normal progress. The school district defended its use of student test scores as a valid and reasonable exercise of discretion.

The trial court found for the teacher. It held that a teachers' professional competence cannot be determined solely on the basis of her students' achievement scores, especially where the students maintain normal educational growth rates. However, the United States Court of Appeals for the

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35. *Id.*

36. Scheelhaase v. Woodbury Cent. Community School Dist. 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

Eighth Circuit reversed. In his concurring opinion, Judge Bright concluded that a board of education may rely on whatever expert opinion it wishes to make its educational decisions. In this case it had relied upon the opinions of the superintendent that "these test results reflected adversely upon the teaching competence of Mrs. Scheelhaase, may have been erroneous but the conclusion was not an unreasoned one."[37] The court further concluded that the decision to terminate could not be faulted as arbitrary and capricious. A board's mere mistake in judgment or in weighing the evidence did not demonstrate any violation of substantive due process.

Ten years later the Supreme Court of Minnesota reached a similar conclusion when it decided *Whaley v. Anoka-Hennepin Independent School District*.[38] In *Whaley*, an elementary school teacher of 19 years was terminated in large part due to lack of student progress. The evidence for this judgment was based on classroom observations of Whaley's teaching and students' working. Observers had recorded the speed of students and their progress in moving through skills tests. For example, the district's reading consultant concluded that Whaley's students did not make satisfactory progress and a fellow teacher who had kept records on the reading program testified that Whaley's students progressed more slowly than other students. The court ruled that substantial evidence supported the school district's findings that Whaley's students made unsatisfactory progress due to his poor teaching performance.

Likewise, school authorities have been successful in using student achievement scores in related contexts when evaluating teachers. The St. Louis Public Schools recently adopted the policy of using scores from the California Achievement Test as part of its annual evaluation of teachers. As a result, certain teachers were denied salary advancement and placed on probation because of low CAT scores of the students assigned to them.[39] Suing in the federal district court, the teachers argued that the CAT was not designed for use as, and has not been validated for use as, a teacher evaluation tool. Furthermore, the school district used students' CAT scores to evaluate only English and mathematics teachers. The teachers asserted that this procedure created a classification among teachers which is arbitrary and capricious.[40] Ruling for the school board, the court applied a rational basis test to the policy. It noted that the "plaintiffs can prove no set of facts which would show the defendants' classification is irrational."[41]

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37. *Id.* at 245.
38. 325 N.W.2d 128 (Minn. 1982).
39. St. Louis Teachers Union, Local 420,AFL-CIO v. St. Louis Bd. of Educ. 652 F. Supp. 425 (E.D. Mo. 1987).
40. *Id.* at 428.
41. *Id.* at 429.

III.
The Role of Evaluation in the Termination Process

State statutes frequently require that a teacher's performance be evaluated before the district proceeds to terminate the contract. The numbers of annual evaluations conducted vary but usually are more frequent for probationary teachers than for tenured teachers. When nonrenewing or terminating teachers' contracts, statutes typically require that only certain grounds serve as bases for termination. Often the statutes identify "grounds" to be used when terminating tenured teachers but refer to "reasons" for dismissing probationary teachers.[42] The difference between grounds and reasons is largely one of specificity. Grounds are statutorily stipulated and consist of three of four areas of deficiency. Reasons could be anything the local board of education feels accurately describes the basis for the termination. However, the reasons should be rationally related to a legitimate objective of the board in retaining qualified teachers.

The focus of this section is the use of the commonly recognized statutory grounds for terminating teachers and the part these grounds play in evaluation. It should be noted that local boards may also use statutory grounds as reasons for terminating nontenured teachers. The most typical statutory grounds are incompetence, immorality, insubordination and other just causes.

In order to show that a teacher has violated one of these grounds, school authorities must have proof. Therefore, the question becomes what kind or level of evidence is sufficient. While proving each of the grounds is different, there are some general principles that can be followed.

A. Sufficiency of Evidence

Local boards of education have considerable discretionary power in assembling evidence. The board's assessment of the facts to determine whether there are grounds or reasons for terminating a teachers' contract in most cases will be accepted by a reviewing court. For example, the Supreme Court of Massachusetts reversed a decision of the state board when it overturned a decision of a local board terminating a teacher for incompetence. The local board had noted that even though the teacher in question was tenured, he had received a poor classroom performance

42. *See supra*, note 9.

evaluation in the year preceding the termination. After being terminated the teacher appealed to the state board. The state board made a review of the facts *de novo* using its own criteria for assessing teacher competence. The local board sued the state board. In holding for the local board the court noted:

> . . . [A] dismissal is justified if it is based on any ground which is not arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of running a sound school system.[43]

A similar decision which upheld the power of the local board occurred in Indiana. A tenured teacher was terminated for placing himself in a compromising position with a female student. When the teacher sued, the trial court sided with the teacher saying that the board had insufficient evidence. On appeal the trial court was reversed. The Court of Appeals of Indiana opined that "[t]he trial court cannot reweigh the evidence for that is the province of the school board . . . the trial court improperly substituted its judgment for that of the school board."[44]

This line of cases would suggest that the local board must base the termination on facts that provide substantial evidence. As long as the decision is not irrational or a pretext for discriminating against the teacher, the termination should be upheld. Nevertheless, well-intentioned school boards have made errors and failed to follow even these relatively lenient standards.

The Supreme Court of Nebraska reinstated a tenured teacher when the local board had terminated him because he left class unattended once while he recovered in the faculty lounge from severe shock from electrical machinery. The court concluded that the board did not have substantial evidence to support termination for incompetence.[45]

Likewise the Supreme Court of Iowa held that a wrestling coach should not have been terminated for failure to maintain a competitive wrestling program and to maintain rapport with athletes. The teacher had received only two unsatisfactory marks out of forty-nine evaluation categories. A second evaluation produced eight unsatisfactories out of forty-nine. However, the second evaluation was completed immediately after a confrontation with some dissatisfied parents.[46]

B. Incompetence

Perhaps more than any other charge used for termination, removing a teacher for incompetence requires that repeated evaluations clearly show

43. School Comm. of Brockton v. Teachers' Retirement Bd., 471 N.E.2d 61, 66 (Mass. 1984).
44. Scott County School Dist. v. Dietrich, 499 N.E.2d 1160, 1172 (Ind. Ct. App. 1986).
45. Hollingsworth v. Board of Educ. of the School Dist. of Alliance, 303 N.W.2d 506 (Neb. 1981).
46. Munger v. Jesup Community School Dist., 325 N.W.2d 377 (Iowa 1982).

unremediated deficiencies. The establishment of incompetence rarely rests on a single incident. *American Law Reports* concludes that the courts' view of teacher incompetence is driving the multiple deficiencies requirement:

> [T]he incompetent teacher is rarely deficient in one respect alone; rather, incompetence seems to manifest itself in a pervasive pattern encompassing a multitude of sins and bringing in its wake disorganization, disharmony, and an atmosphere unproductive for the acquisition of knowledge or any other ancillary benefit.[47]

Compared to other grounds that are used to terminate teachers, incompetence is the most time-consuming and demanding of documentation. Nevertheless, it remains one of the most often used grounds for removing teachers. Incompetence is the deficiency most related to the teaching process. When a board of education attempts to carry out its goal of retaining "good teachers," removing those that are incompetent seems to follow. While incompetence can consist of a number of different deficiencies, the areas found to be most recently litigated include student control problems and instructional failures.

1. Student Control Problems

While lack of classroom control is one of the major problems leading to the nonrenewal of the probationary teachers' contracts, the dismissals that have most often produced litigation are those of tenured teachers. In a majority of recent court cases, school districts have been successful against challenges from teachers.

The Supreme Court of Iowa upheld the termination of a tenured teacher for incompetence based on evidence derived from the classroom observations. The evaluation indicated that during the teacher's class, students talked, daydreamed, wandered about the room, moved desks, and left the room without permission. However, many of the same students behaved properly in classes of other teachers. The court rejected the teacher's defense that he was ill at the time he received poor evaluations. Consistent with the need for school districts to show evidence of multiple deficiencies when using incompetence as grounds for termination, the district also successfully showed that the teacher used an unusually large number of films and slides instead of teaching. Also, the teacher did not meet the district's guidelines for use of demonstrations by science teachers.[48]

An Illinois teacher of twenty-five years was terminated for incompetence because she "failed to maintain proper discipline." The school district was

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47. 4 A.L.R. 3d 1090 at 1102.

48. Board of Directors of Sioux City v. Mroz, 295 N.W.2d 447, 449 (Iowa 1980). *See also* Thompson v. School Dist. of Omaha, 623 F.2d 46 (8th 1980).

able to show that the lack of discipline was due to the students being bored and confused. The students suffered this state of confusion because the teacher committed a number of instructional errors and failed to prepare properly for class. The facts of the case show that the deficiencies related to the incompetence can be interrelated. The court found that the school district had sufficient evidence to terminate the teacher.[49]

One court recognized the difficulty in evaluating classroom control by quantifiable measures and therefore viewed lack of classroom discipline to be properly assessed by general observation:

> [O]ne can imagine (with horror) uniform guidelines framed in terms of permissible decibel levels or schedules of acceptable incidents of misbehavior per unit of time or student population. The lack of empirical standards applicable to this area of teacher competence mandates that evaluation of teacher performance be left to those with the professional experience and skill to meaningfully assess classroom order. . .[50]

In the case just quoted, the tenured teacher had asserted that the termination for incompetence because of poor classroom management was unjustified. Her students met all of the academic standards appropriate for the subjects being taught. Therefore, the school district could not show that the students were not learning. In fact, they were learning. The court opined, however, that having good classroom control is a value in itself:

> We view as no less important than academic knowledge the teaching of standards of civilized behavior necessary to the functioning of society. . . A school which produced well-educated sociopaths would be as inimical to democracy as one which created well-educated robots.[51]

As discussed in a later section on evaluation procedures, giving teachers an opportunity to remediate their incompetence can be an important part of the school district's success if litigation occurs. In addition to lack of classroom control as a source of incompetence, deficiencies associated with failures in proper instruction are often used.

2. Poor Instructional Performance

When teachers have used the courts to challenge their terminations because of poor instructional performance, their record of success has been good. Roughly one-half of the cases identified showed the courts ruling for the teachers. The success rate is much better than that of teachers who contest their dismissals resulting from classroom management problems.

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49. Community Unit School Dist. No. 60 v. Maclin, 435 N.E.2d 845 (Ill. 1982).
50. CTA v. Governing Board of Livingston Unified School Dist., 192 Cal. Rptr. 358, 363 (Ct. App. 1983).
51. *Id.* at 363.

The Nebraska Supreme Court ruled for a terminated tenured teacher whose employing school district based its decision on complaints from parents that the teacher gave too much homework. During the twelve years of continuous employment, the teacher had received "above average" ratings. The record showed that the only time the teacher had received a negative comment on her evaluation was in the year of her termination. The comment recommended that she do a better job in her relations with parents. However, there were other teachers who were not terminated who had less positive overall ratings. The court noted that:

> Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.[52]

In a case also dealing with classroom performance ratings, a school district terminated several teachers based on insufficient efficiency ratings. The district superintendent used a scale of 0 to 80 to rate each professional employee. When the low-rated teachers challenged their terminations, the court ruled that the ratings, absent anecdotal records, would be insufficient evidence to support termination. Therefore, the superintendent should have had narrative data from actual classroom observations to back up the scores.[53]

A Montana school district had adopted a policy that required all new teacher applicants as well as current teachers who were to be transferred to another school to undergo a series of structured interviews. A tenured teacher of thirteen years, transferred to another school because of declining enrollment, was required to undergo four structured interviews conducted by school district supervisors. The teacher did poorly at all four interviews. As a result she was terminated. On appeal, the County and State Superintendents ruled that the teacher should be reinstated. However, the school board took the case to court where the termination was upheld. On appeal the Supreme Court of Montana held for the teacher. The high court ruled that the lower court erred in substituting its judgment for the judgment of the State Superintendent. The State Superintendent's judgment was not clearly erroneous in that the evidence showed the teacher had thirteen years of satisfactory evaluations. Poor performance on some interviews could not wipe out thirteen years of satisfactory performance to the degree necessary to prove incompetence.[54]

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52. Schulz v. Board of Educ. of Fremont, 315 N.W.2d 633 (Neb. 1982).
53. Carmody v. Board of Directors of Riverside, 453 A.2d 965 (Pa. 1982).
54. Trustees, Missoula City School Dist. v. Anderson, 737 P.2d 1315 (Mont. 1988).

School districts have successfully defended their termination decisions for incompetence when several supervisors have conducted classroom observations over extended periods of time and when the teachers do not improve after being given time, direction and opportunity. For example, a Louisiana tenured teacher of many years was initially evaluated by her principal. The principal found that students in her class were not actively participating. The teacher was given specific recommendations on how to improve. Two months later the principal returned to find that the problem was not solved. Rather, additional instructional problems were observed. This time the teacher was not prepared. One month later a subject consultant from the central office observed the class and found similar kinds of problems. Again, the teacher was given more suggestions for improvement. A month later the personnel director for the school district made a classroom observation. His findings corroborated previous observations. Finally, a second school principal made an observation a month later and found the teacher having problems with her lesson plans.[55]

In total, this Louisiana teacher had two years to improve but with no success. The teacher challenged the decision to terminate, asserting that the decision was based on race. The federal district court ruled for the school district noting that "any hint of racial prejudice ... is inconsistent with the facts presented at trial in that Mrs. Jones problems with teaching were well documented."[56]

In a similar case, a Pennsylvania teacher was observed by her principal as having problems with organizing lessons. The principal conferred with the teacher to assist her in overcoming the problems he had observed but saw no improvement by the end of the school year. The superintendent was asked to conduct a follow-up observation at the beginning of the next year. He found that the teacher was using improper instructional techniques. At trial the teacher defended herself by asserting that the school was responsible for her problems. It was claimed that the school failed to provide adequate orientation for the teacher before she assumed her duties. Ruling for the school district, the court noted that the teacher was evaluated several times by several trained observers and was found deficient in instructional areas.[57] The court further noted that "[s]uch evidence establishes *prima facie* the validity of the rating and a discharge based on the rating."[58]

While no judicial standard has been articulated for finding sufficient evidence to support teacher incompetence, the case law suggests that school

55. Jones v. Jefferson Parish School Bd., 533 F. Supp. 816 (E.D. La. 1982).
56. *Id.* at 822.
57. Kudasik v. Board of Directors, 455 A.2d 261 (Pa. 1983).
58. *Id.* at 264.

districts need to document thoroughly the teacher's deficiencies. In addition, having several trained observers agree on inadequacy of performance would strengthen the school district's case. Also important is giving the teacher specific tutoring for improvement and sufficient time to make the improvements.

C. Immorality

Immorality continues to be an often-used ground for the termination of teachers. Determining that the teacher has not met the standard for moral fitness is a subject for the evaluation process. While immorality would be difficult to connect to actual in-class performance, its detection is no less significant. Typically moral unfitness is a judgment call by the school board. The need to make a decision about a teachers moral fitness is thrust upon the board by events "reported" by the administration, students or the public. While the moral fitness components of an evaluation is not subject to precise measurement, it does become part of the overall summative evaluation. The United States Supreme Court has recognized the importance of local authorities considering moral fitness of teachers.[59] The more difficult questions are: how is immorality defined and what teacher behaviors have courts considered to be within this definition? The preponderance of cases in the last decade involving termination because of immorality have been won by the school districts. The behaviors at issue generally involve dishonesty or sexual misconduct.

1. Dishonesty

In the category of dishonesty school boards have been particularly successful when teachers have challenged the termination. For example, a Pennsylvania teacher of fifteen years was terminated for having claimed to be working as a guidance counselor in the evenings for the school district. While he was paid for his time, he in fact did not work the hours corresponding to the claim. The school board used the ground of immorality for the termination. Lying fell within the definition of immorality as defined by the court:

> [a]course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate.[60]

In another case, in which the teacher gave false information to an employer, the tenured teacher had wished to attend a conference but was denied paid personal leave to do so. She went to the conference anyway

59. *See* Board of Educ. v. Pico, 457 U.S. 853 (1982).
60. Balog v. McKeesport Area Sch. Dist., 484 A.2d 198, 200 (Pa. Commw. Ct. 1984).

and upon return told the personnel office the reason for her absence was illness. To support her claim, a statement was presented by the teacher's husband. The report contained medical information which was alleged to be based on a visit to the family physician. Upon learning of the misrepresentation, the physician contacted the school district to retract the report. The court observed that because "questions of morality are not limited to sexual conduct, but may include lying,"[61] it sustained the termination.

A related behavior that has also been interpreted as falling under immorality is stealing. A Missouri court of appeals upheld the termination of a tenured teacher-librarian for having stolen school property.[62] Between 1973 and 1982, three incidents resulted in what school authorities claimed had a negative effect on the teacher's relationships with other faculty and students. The first incident involved a missing teapot that had been used as a prop in the school play. The item was returned by the teacher after word was disseminated that it was missing. Two years later she took $20.00 from gate receipts collected at a basketball game, although she refunded the money after being confronted about the matter. Several years later the teacher-librarian took a set of books belonging to the school district. When confronted with the matter, she claimed that the books were never received by the vendor. Later she returned the books. In this stealing case, the teacher's defense was that the school district failed to prove that she was unfit to teach and that immorality could not be shown because she returned all of the items taken. In rejecting this argument, the court noted:

> The taking of property belonging to another without consent, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of an impressionable age.[63]

The decision of the court reversed a lower court decision which earlier found the termination arbitrary, capricious and unreasonable.

2. Sexual Misconduct

Termination for sexual misconduct has been upheld when the teachers' sexual activity involved students. A New Mexico teacher was terminated

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61. Bethel Park School Dist. v. Krall, 445 A.2d 1377, 1378 (Pa. Commw. 1982). *Also see*, Dohanic v. Commonwealth of Pa., Dep't of Educ. 533 A.2d 812 (Pa. Commw. Ct. 1987) (teacher forged notes for students).

62. Kimble v. Worth County R-III Bd. of Educ., 669 S.W.2d 949 (Mo. Ct. App. 1984) *cert. denied*. 103 S. Ct. 331 (1984).

63. *Id.* at 953.

for immorality when it was found that he had sexually touched two high school students. Twenty-eight witnesses testified that the teacher, a male, had kissed and fondled students' intimate parts. These unwelcome advances took place in the school gymnasium. While the decision was taken on appeal to the State Board of Education, a large number of phone calls were received. Individuals from the community supported the good character of the teacher. Without consideration for the findings of the local board, the State Board reversed the termination decision. However, the Court of Appeals of New Mexico reversed the State Board's decision finding it unreasonable. The court said:

> [B]efore the State Board opts to reject the decision of its hearing officer, particularly when the credibility of the witnesses is at issue, that at the very least, it review so much of the transcript of the proceedings before the hearing officer as is necessary to support its decision.[64]

The same appellate court a year earlier had upheld a decision of the State Board of Education to deny the recertification of a male teacher who had been convicted of criminal sexual misconduct. The teacher had committed incest with his 13 year old step-daughter. Based on this conviction, the State Board of Education revoked his teaching certificate. Although convicted, the teacher was given a deferred sentence and entered rehabilitation therapy. Upon completion of his therapy, he applied for recertification. He argued that he was not "convicted" of a crime because he was given a deferred sentence, and therefore the conviction cannot be used as a basis for denying recertification. Further he argued that there was no substantial evidence that he was not rehabilitated to support denial of the application.[65] Holding for the State Board, the court noted:

> [T]he jury determination of the teacher's guilt of criminal sexual conduct with a child under the age of 13 acted as "conviction" despite subsequent dismissal of the case after the teacher completed his deferred sentence.[66]

The Sixth Circuit Court of Appeals upheld the nonrenewal of a bisexual guidance counselor when the local board concluded she was unfit to do her job.[67] Evidence revealed that the counselor told several of her colleagues and the administration that she was bisexual. In addition she revealed by name two female students she had been counseling as being homosexual. The guidance counselor argued that her constitutional first and fourteenth

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64. Melrose Municipal School Bd. of Educ. v. State Bd. of Ed. 740 P.2d 123, 125 (N.M. Ct. App. 1987). *See also,* Keating v. Riverside Bd. of School Directors, 513 A.2d 547 (Pa. Commw. Ct. 1986) (teacher termination upheld when found to be "attempting" to have a social and emotional relationship with 16 year old student).

65. Garcia v. State Bd. of Educ., 694 P.2d 1371 (N.M. Ct. App. 1984).

66. *Id.* at 1375.

67. Rowland v. Mad River School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied,* 471 U.S. 1062 (1985).

amendment rights had been violated by the nonrenewal. However, the court held that her communication of sexual preferences was not made as a citizen on a matter of public concern and hence no federal first amendment cause of action could be maintained against the school district. On the fourteenth amendment claim, the court held that absent evidence that heterosexual school employees in situations similar to the counselor's had been or would be treated differently for communicating their personal sexual preferences, the counselor's argument could not prevail. The school board was successful in arguing that the nonrenewal was based on the counselor's violation of confidentiality when she revealed the sexual orientation of two students. This behavior was viewed as unsatisfactory for a counselor.

A New Mexico school board terminated a junior high assistant principal for immorality when it was found he was having an affair with the school secretary.[68] Evidence showed that the couple had intercourse in the school home economics lab as well as in the secretary's apartment. After one year, the secretary became pregnant. At this time rumors of the affair spread throughout the community. Prior to the end of the school year, the assistant principal was suspended pending a hearing before the local board. At the hearing the board concluded not only that immoral conduct was committed but that the notoriety of the incident had caused the assistant principal to lose respect necessary for him to perform his duties.

On appeal to the State Board of Education the decision of the local board was reversed. The State Board assumed that an affair took place but as a matter of policy declined to fire the assistant principal for having that affair. While having intercourse on school grounds might have turned the decision the other way, the State Board felt the local hearing failed to produce sufficient evidence of the incident. On appeal to the state appellate court, it affirmed the State Board's decision. Stating its opinion in the null form it said:

> We do not hold that staff members cannot be fired for having sexual intercourse on school property. Nor do we hold that knowledge of an adulterous affair can never significantly impair job performance. We decide the case on the facts presented here. . . . So long as the State Board's decision is not unreasonable, is supported by substantial evidence, and is in accordance with the law, we will not substitute our judgment.[69]

Terminations for immorality based on a role model standard (or lack thereof) have been reversed by the courts when there is an assumption that certain behaviors are inherently immoral. For example, the Fifth Circuit

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68. Board of Educ. of Alamogordo Pub. School Dist. v. Jennings, 651 P.2d 1037 (N.M. Ct. App. 1982).
69. *Id.* at 1043.

Court of Appeals reversed a lower court finding that it was lawful for an Alabama school district to dismiss a tenured teacher for becoming pregnant while unmarried.[70] The school district argued that unwed parenthood is *per se* proof of immorality. In holding that the termination was in violation of the teacher's equal protection rights, the court noted that the school district failed to distinguish the facts from an earlier Fifth Circuit holding. In *Andrews v. Drew Municipal Separate School District*, a local school district had automatically disqualified from employment any parent of an illegitimate child. The school believed that having an unwed mother in the employ of the district would create an improper moral scholastic environment.[71] The court rejected this argument and found the policy not rationally related to a legitimate government interest. In order for the school district to succeed in terminating a teacher who is not married and pregnant, it appears that school officials would have to show that the decision to terminate must been made absent the unwed pregnancy.[72]

In a recent Illinois case, a high school guidance counselor was reinstated because there were no witnesses to an alleged sexual advancement upon a student. The hearing officer concluded that the offended student's testimony was not credible while the counselor's testimony was credible. In this case the counselor was able to produce numerous persons testifying to his life long reputation for truthfulness, honesty and integrity.[73]

The homosexual activities of teachers was at issue in *National Gay Task Force v. Board of Education of City of Oklahoma City*.[74] Oklahoma had a state statute which permitted school districts to terminate teachers who were found to have been engaged in "public homosexual conduct" or for "advocating . . . encouraging or promoting public or private homosexual activity. A teacher had been terminated for appearing on a television spot which encouraged the repeal of sodomy laws in the state. The school district considered this ad as advocating homosexuality. The statute considered a teacher "unfit" if he/she advocated homosexuality because it would adversely effect the students or school employees. That portion of the statute which punished for advocating homosexuality was held unconstitutional. The court noted that the statute was overbroad in that it punished for public utterance at any place or time. An actual showing that an adverse effect was occurring was not a prerequisite to a finding of unfitness. The court noted that any statement by a teacher may cause adverse affects. When dealing with protected conduct, the standard must be one of "material

70. Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982), *cert. denied* 461 U.S. 943 (1983).
71. Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975).
72. *See* Eckmann v. Board of Educ. of Hawthorn Sch. Dist., 636 F. Supp. 1214 (N.D. Ill. 1986).
73. Board of Educ. of Tonica Community High School v. Sickley, 479 N.E.2d 1142 (Ill. Ct. App. 1985).
74. 729 F.2d 1270 (10th Cir. 1984).

and substantial disruption." That portion of the statute which allows termination for public homosexual conduct was held to be constitutional.[75] *The National Gay Task Force* case suggests that homosexual teachers are protected as long as the students' knowledge of the sexual preference of the teacher does not cause material and substantial disruption.

D. Insubordination

Insubordination among teachers has been defined as the willful disregard for or refusal to obey school regulations and official orders.[76] Among the various reasons used by boards to evaluate teachers, insubordination is the easiest to show. Unlike incompetence or immorality, which often rest on the sufficiency of evidence, a teacher either disobeyed a rule or order or did not. Perhaps the reason these violations are not more often the focus of terminations is because insubordination is less closely related to the teaching process. Philosophically, it would seem more appropriate to remove a teacher for being an unfit teacher than for "not being a good soldier." Nevertheless, there are school systems that expressly require a high degree of compliance by teachers.

A school district can be successful in charging a teacher with insubordination even though the teacher can show actual classroom performance has been satisfactory. For example, in *Sutherby v. Gobles Board of Education*[77] a tenured teacher had been warned about his repeated failure to comply with the "teacher handbook." Among his rule violations were: failure to submit lesson plans, improper use of hall passes and allowing students to play cards during class. While the teacher did not refute his failure to comply with the handbook, he did argue that a tenured teacher may not be dismissed for violations of administrative regulations when classroom performance has been satisfactory. In rejecting this argument the court noted that the state statute forbade a teacher's discharge for reasons other than "professional competency." In the words of the opinion:

> [T]he phrase "professional competency" covers more than just teaching skill. We believe that it includes compliance with reasonable administrative rules and regulations which may be required for the effective operation of a school or school system.[78]

The court held for the school district noting that intentional refusal to obey a reasonable order from a superior does not require on-going defiant conduct.

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75. *Id.* at 1275.
76. Annot., 78 A.L.R.3d 83 (1977).
77. 348 N.W.2d 277 (Mich. Ct. App. 1984).
78. *Id.* at 280.

School districts have been successful in terminating for insubordination even when the violation is for rules that are not preexisting. Recently, the Colorado Supreme Court upheld the termination of a tenured teacher for insubordination when the teacher used profanity. The teacher received a written warning from the superintendent asking him to "discontinue the use of profanity in the presence of students," and "control your emotions when communicating with parents and students, and act in a professional manner."[79]

Consistent with the Colorado ruling, the Ninth Circuit Court of Appeals upheld the termination of a tenured teacher for insubordination when the faculty supervisor of the school newspaper failed to show the principal drafts of the stories prior to publication.[80] Also interesting is one state appellate court's interpreting a teacher's failure to improve teaching performance as insubordination rather than incompetence.[81]

Failure to comply with school board policies prohibiting the use of corporal punishment was used as the basis for terminating teachers for insubordination in at least two cases. A tenured junior high school teacher struck a student on the jaw with his hand in an attempt to maintain classroom control. After this incident, the teacher was given a written reprimand. He was reminded that the school district policy required that corporal punishment only be administered by administrative personnel. Four months later, the same teacher pinched the skin area between a student's neck and shoulder causing a red mark. At this point the teacher was suspended and subsequently terminated for insubordination. At trial, the teacher defended his actions on two grounds. First, he showed that several of his classroom evaluations called for him to make improvements in classroom control. The physical contact he used was motivated by these evaluations. Second, the teacher interpreted the corporal punishment policy as restricting paddling. The teacher did not paddle. The court rejected the teacher's arguments noting that regardless of the teacher's interpretation of corporal punishment, he had been warned in writing that his form of physical contact with students was prohibited.[82]

A finding of insubordination is tied to a teacher's overall summative evaluation. As noted earlier in this monograph, there are two types of evaluations, summative and formative. A formative evaluation is focused on improving teaching performance. A summative evaluation is focused on guaranteeing to the board of education that a teacher is fit to continue

79. Ware v. Morgan City School Dist., 748 P.2d 1295, 1297 (Colo. 1988).
80. Nicholson v. Board of Educ. Torrance Unified School Dist., 682 F.2d 858 (9th Cir. 1982).
81. Thompson v. Board of Educ., 668 P.2d 954 (Colo. Ct. App. 1983).
82. Simmons v. Vancouver School Dist. No. 37, 704 P.2d 648 (Wash. Ct. App. 1985).

as an employee. The summative evaluation may include many more judgments than just classroom performance. Clearly, the board's right to retain teachers who will follow board policy and administrative regulations is part of an overall summative evaluation.

The interpretation of the school district corporal punishment policy also became an issue in the case of a Michigan high school teacher. During a four year period the teacher was engaged in four incidents were he used corporal punishment. In the first incident, he kicked and pushed a female student in an attempt to get her to return to his classroom. In the second case, he struck the student in the face with his fist. A third incident involved the teacher slapping and punching a student while the teacher held the student in a headlock. In the final incident, the teacher struck a female student in the face and knocked her to the floor. The teacher was given a written reprimand after each incident and reminded of the school district policy. The policy read: "the board of education does not encourage corporal punishment. It should be used only as a matter of last resort."[83] Surprisingly, the teacher made a defense based on alleged procedural errors by the hearing officer and the board. The court found no procedural deficits. Perhaps the strongest argument was overlooked by the teacher. Is the board policy void for vagueness? Why could not the teacher have argued that "it was the last resort" in each of the disciplinary incidents?

83. Tomczik v. State Tenure Comm'n, 438 N.W.2d 642, 645 (Mich. Ct. App. 1989).

IV.

Procedural Aspects of an Evaluation

The administration may select procedures to evaluate teachers that subject the school board to legal challenges. The procedures followed must conform to the fundamental elements of the due process requirements of the fourteenth amendment to the Constitution. Elements of due process are reflected in using an evaluation instrument that is objective and that provides adequate notice to the teacher of the criteria that will be used and an opportunity to understand those criteria. Also, giving the teacher an opportunity to remediate the deficiencies cited in the evaluation may be required by statutes, board policy or collective agreement.

The procedures used can vary widely from state to state and even from school district to school district. Variations are a product of the extent to which state legislatures establish procedures by statute. Where the legislature prefers to defer to local control, the state education agency may regulate procedures. Once statutory and regulatory parameters are recognized, the local school board may condition the evaluation procedures on collective bargaining agreements with the teachers' organization. The procedural aspects of evaluating a probationary teacher are often different from those procedures used with tenured teachers. Regardless of which or how many levels of control shape the evaluation procedures, the fourteenth amendment can be used by disaffected teachers to challenge the procedures.

However, if an evaluation procedure is challenged as a violation of the fourteenth amendment and is pursued in federal court, the failure of school authorities to follow procedures does not necessarily render the process unconstitutional. For example, in *Goodrich v. Newport News School Board*[84] a tenured teacher was terminated after she received notice, specification of the charges and a hearing where she was able to present her defense. However, she challenged the procedures used in her teaching evaluation as a violation of her due process guarantees. Local board policy required that the administration provide three evaluations during the year. The teacher was given only two. The United States Court of Appeals for the Fourth Circuit ruled for the school board. It noted that a violation of state or local board policies is not *per se* a violation of the federal constitution. In the instant case, the teacher was given adequate procedural due process thus the federal constitution is satisfied. A failure of strict compliance with specific local procedures is a matter to be taken up in state court.[85]

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84. 743 F.2d 225 (4th Cir. 1984).
85. *Id.* at 227.

On the other hand, a state court is likely to hold the school board to strict compliance with established evaluation policies. Four West Virginia teachers where given disciplinary transfers to another building after the superintendent determined that they were insubordinate. The West Virginia State Board of Education policy required that disciplinary transfers be based solely upon regular performance evaluations. The state court found that the teachers' evaluations were not the basis for the transfers therefore the decision was improper.[86]

A. Using Objective Criteria

Objective criteria concerning teaching performance should be incorporated into the evaluation and used to evaluate each teacher. The results of the evaluation can include comparisons to the performance of other teachers. Recently a Nebraska teacher had argued that the principal's evaluation of her teaching was invalid because he compared her to others in the building. She maintained that her teaching performance was an individual matter to be measured against objective standards. However, the Supreme Court of Nebraska ruled for the school district, noting:

> Teacher incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection but, instead, must be measured against the standard required of others performing the same or similar duties.[87]

While objective criteria are an essential part of the evaluation, the evaluator is not precluded from using "subjective" observations as part of the overall process. An Arkansas teacher had been given a nonrenewal based on a series of poor evaluations. The evaluations included the use of an objective, in classroom, teacher performance instrument as well as observations of other behaviors from the principal. On the classroom performance instrument, the teacher had been given a 1.7 which placed him between "good" and "average". However, the principal had observed that the teacher had done the following: used improper language with students, failed to maintain order and control of the classroom, neglected to turn in reports, allowed school equipment to be destroyed, and left campus without authorization. The teacher argued that the decision to nonrenew was based on subjective evaluations and therefore, cannot support the employment decision. The United States Court of Appeals for the Eighth Circuit ruled for the school district. In rejecting the teacher's argument concerning the use of

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86. Holland v. Board of Educ. of Raleigh County, W.Va. 327 S.E.2d 155 (W.Va. 1985).
87. Eshom v. Board of Educ. of School Dist. No. 54, 364 N.W.2d 7, 13 (Neb. 1985).

subjective evaluations the court reasoned that:

> While subjective evaluations must be closely scrutinized when they form the basis of asserted legitimate, nondiscriminatory reasons for an employment decision, they do not necessarily render invalid an employer's asserted reasons.[88]

It should be noted that "who" evaluates teachers can be a legal issue. In a West Virginia case, the Director of Federal Programs for the county public school system was dismissed for incompetency. He challenged the dismissal, arguing that no administrator had ever evaluated his performance. The board of education concluded that the teacher was unfit. In reinstating the teacher, the court ruled that members of a board of education are not qualified to make teacher evaluations. The court stated:

> [T]he law does not contemplate that the members of a board of education shall supervise the professional work of teachers, principals, and superintendents. They are not teachers, and ordinarily not qualified to be such. Generally they do not possess qualifications to pass upon methods of instruction and discipline. The law clearly contemplates that professionally trained teachers, principals and superintendents shall have exclusive control of these matters.[89]

An interesting procedural argument was recently made by a Department of Defense teacher who was terminated for incompetence. The school principal had developed a set of objective criteria for evaluating teaching performance. After applying these criteria, the administrators noted that the plaintiff teacher had the following deficiencies: (1) failure to maintain a gradebook indicating twice weekly feedback to students; (2) failure to develop a written grading system which specified the weighing of factors used in the determination of grades; (3) failure to submit the required course outlines; and (4) failure to prepare lesson plans.[90] The teacher was given three months to correct these deficiencies. After the remediation period, it was decided that little or no progress was made. A nonrenewal letter was sent. Before the appellate court, the teacher argued that his performance standards were invalid because they did not inform him of what was necessary to achieve a satisfactory or acceptable rating and because they required "absolute" compliance. In rejecting the teacher's arguments, the court reasoned that although the standards by which the teacher was evaluated did require some subjective evaluation, they were sufficiently objective and precise in the sense that most people would understand what they meant and what they required.[91]

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88. Tyler v. Hot Springs School Dist. No. 6, 827 F.2d 1227, 1229 (8th Cir. 1987).
89. Trimboli v. Board of Educ. of Wayne County, 280 S.E.2d 686, 688 (W. Va. 1981).
90. *See* Rogers, at 1551 n.11.
91. *Id.* at 1553.

B. Remediation

Once deficiencies are noted as a result of the evaluation, many states' statues require that the teacher be given a reasonable amount of time to improve. In addition, the school administration typically has some responsibility for assisting the teacher during this period of improvement. For example, the Washington statutes requires that

> [e]very employee whose work is judged unsatisfactory based on district evaluation criteria shall be notified in writing of stated specific areas of deficiencies along with a suggested specific and reasonable program of improvement on or before February 1st of each year. A probationary period shall be established beginning on or before February 1st and ending no later than May 1st.[92]

Illinois has a statute similar to that of Washington. While the time lines are not stipulated in the Illinois statute, it is clear that school authorities must have a remediation plan in place before terminating a teacher.[93] Most of the litigation surrounding remediation issues there have turned on whether the teacher behavior was "remediable". If the behavior is not of a nature that could be remediated, then school authorities could proceed without a remediation plan or a period of improvement.

The Supreme Court of Washington upheld the dismissal of a tenured teacher for striking students' genitals. The teacher had argued that the school district erred in not giving him a period of improvement and the conduct fell within the scope of "remediable teaching deficiencies" as defined by the Washington statute. In rejecting this argument the court noted that

> ...the striking of students in the genitals, for whatever reason, is so patently unacceptable that the school district was entitled to discharge the teacher for his actions in this case regardless of prior warnings.[94]

Sexually related conduct was also the issue in a recent Illinois case. A Chicago male elementary school teacher was dismissed for having touched the buttocks and breasts of four female students. The school district proceeded against the teacher without any warning letter or period for improvement. The district maintained that it was only required to provide warning when the teacher behavior is remediable. The teacher argued that he should have been given both a warning and a period for improvement.[95]

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92. Wash. Rev. Code §28 A.67.065.
93. Ill. Rev. Stat. 1989, ch. 110, pars. 24-12.
94. Mott v. Endicott School Dist. No. 308, 695 P.2d 1010 (Wash. 1985)
95. Board of Educ. of City of Chicago v. Box, 547 N.E.2d 627, 633 (Ill. Ct. App. 1989).

The court used a two-prong test for determining remediability. Regarding the remediability of the teacher behavior, the test inquires: (1) whether damage has been done to the students, faculty, or school; and (2) whether the conduct resulting in that damage could have been corrected had the teacher's superiors warned him.[96] In applying the first prong to the instant case, the court accepted evidence that the students had been psychologically harmed by the teacher. On the second prong, the court suggested that the focus of the inquiry be on whether the effects of the conduct itself could have been corrected. In this case, a warning could not have corrected the psychological damage to the reputations of the faculty and school district that was caused by the defendant's conduct.[97] The court upheld the dismissal.

Teachers have won their cases alleging improper dismissals when issues of remediation have been involved. An Illinois court found that an elementary school teacher was improperly dismissed for using excessive force with his fourth grade students. The teacher argued that the behavior was remediable and therefore a warning with a period of improvement should have been provided. The school's corporal punishment policy required that after oral instructions and techniques have failed a teacher may "direct the pupil toward a desired location but should refrain from the use of sufficient force to severely hurt the pupil."[98] The policy further provides that the principal or other person designated may strike the pupil with an open hand below the neck.

Using the two prong test established by the Illinois courts, it concluded that in the first instance, the school had a policy that allowed corporal punishment. Therefore, if it is allowed by the rules it is therefore not always irremediable conduct. On the second prong, the court found that had the teacher been given a warning about his implementation of the corporal punishment policy, he could have corrected his behavior.[99]

In another Illinois case, a tenured school nurse was dismissed for not having obtained parental permission before inoculating a group of elementary school students. The court ruled that the nurse's conduct was remediable. She should have been given a warning and period of remediation.[100]

The Supreme Court of West Virginia ruled for an elementary teacher when she was dismissed without warning for having left her class unattended. The teacher had received some disturbing information about her

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96. *Id.* (citing Gilliland v. Board of Educ. of Pleasant View Consol. School Dist.No. 622, 365 N.E.2d 322 (Ill. 1977)).

97. *Id.* at 633.

98. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 445 N.E.2d 832, 833 (Ill. Ct. App. 1983).

99. *Id.* at 835.

100. Chicago Bd. of Educ. v. Illinois St. Bd. of Educ., 513 N.E.2d 845 (Ill. Ct. App. 1987).

paycheck and left her room to go to the payroll office. The office at her school attempted to discuss the matter with her before she left the premises. However, at no time was the teacher given an order to remain in her class nor told what would happen if she left. The court concluded that the teacher's conduct could have been corrected by a simple directive not to leave the class. Therefore, the dismissal was arbitrary and capricious and in violation of her due process rights.[101]

The question of how much time is sufficient for a period of improvement was at issue in an Illinois case. A tenured teacher had been on a formal remediation plan for two and one-half months. The teacher was a speech pathologist who had been cited for not having completed reports and having lost student files. During the period of remediation, the school supervisors were in constant contact with the teacher, clarifying the remediation plan, establishing deadlines, and offering their assistance. However, the teacher continued to fail to meet the deadlines or to accomplish the tasks on the plan.

During the trial, the teacher argued that the two and one-half month period of remediation was insufficient. She offered as evidence that she was going through a period of clinical depression and was unable to give full attention to improving. However, the court noted that the teacher did not successfully establish mental incapacity. Therefore, the period of time provided for remediation was sufficient.[102]

101. Monteith v. Board of Educ., 375 S.E.2d 209 (W.Va. 1988).
102. deOliveira v. State Bd. of Educ., 511 N.E.2d 178 (Ill. Ct. App. 1987).

V.
The Use of Testing in the Evaluation of Teachers

One of the most controversial methods of teacher evaluation is the use of competency testing. To date, only a few states have required currently certified teachers to pass a competency examination to retain their certification.[103] However, with more and more states considering substantial education reform, and the public demanding accountability in return for the increased tax burden necessary to pay for such reform, teacher competency testing surely will be on the agendas of more states in the future. And even if legislatures do not mandate competency tests on a statewide basis, individual school districts will still face the issue at the local level.

A majority of states now employ competency tests as a prerequisite to the initial certification of prospective teachers.[104] State legislatures have been much more reluctant, however, to extend testing to currently certified teachers. Certainly the legal issues presented, and the clash between the interests of the state in ensuring the quality of its public education and the interests of individual teachers in pursuing their professional calling, become much more pronounced when actual decertification is at issue.[105] The potential legal problems are not insurmountable, however. Careful planning, with an awareness of the variety of legal issues that may arise, will aid state education officials and local school boards in developing testing programs that pass muster in the courts.

Several themes run through the case law on competency testing. First is the central importance of the validity of the test. A test that does not measure what it purports to measure will be subject to attack on several fronts. Second is the concern in the courts over actions that have a disproportionate effect on a particular class of persons in our society. Thus, any testing procedure that has a disparate impact on minorities, or perhaps on older Americans or persons with disabilities, will be particularly suspect. A final theme to keep in mind is the pervasive attitude of judicial deference to the decisions of educational policymakers. Judges are very reluctant to second-guess educators in matters of educational policy, and

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103. *See* Ark. Code Ann. §6-17-601 (1987); Ga. Code Ann. §20-2- 200 (Supp. 1987); Tex. Educ. Code Ann. §13.047 (Vernon Supp. 1987).

104. *See* generally Lines, *Teacher Competency Testing: Review of Legal Considerations*, 23 Educ. L. Rep. 811, 813 (1985).

105. Competency tests also may be used as basis for salary and promotion decisions, but it is testing as prerequisite for continued employment that brings this clash of interests into the clearest focus.

this general posture probably will play a significant role in the area of teacher competency testing—with the result that even tests of questionable merit may be upheld in the courts.

A. Test Validity

The use of competency testing is designed to improve the quality of teaching in the public schools by weeding out incompetent teachers and by providing an incentive to current teachers to improve their skills. Certainly these are admirable goals, but with teachers' livelihoods at stake, competency testing cannot survive unless the examinations do what they are intended to do—measure the competence of the teachers tested. In other words, the tests must be valid.

The first step in determining the validity of a competency examination is to select an appropriate validation technique. The courts generally have relied upon two sets of standards for test validation—the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) adopted by the Equal Employment Opportunity Commission (EEOC),[106] and the Standards for Educational and Psychological Testing (APA Standards) adopted by the American Psychological Association.[107] Fortunately, the two sets of standards are consistent, so compliance with one will constitute compliance with the other.[108]

The three generally recognized methods of test validation, under both the EEOC's Uniform Guidelines and the APA Standards, are (1) criterion-related validation, (2) content validation, and (3) construct validation. One's choice of a validation strategy is dictated by the kind of inference the user wishes to draw.

A criterion-related validity study identifies relevant measures (criteria) of job performance and then compares test scores to the level of success on

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106. 29 C.F.R. §1607.1-.18 (1989). The reader should note at the outset that the primary purpose of these guidelines is to assist employers in complying with federal laws prohibiting *discrimination* on the basis of race, religion, sex, and national origin. They "do not require a user to conduct validity studies of selection procedures where no adverse impact results." *Id.* §1607.1(B). However, the use of competency tests traditionally has had disproportionate impact on minorities, *see infra* text accompanying notes 133-40, so the guidelines generally will be applicable in the teacher testing arena. Moreover, the use of invalid tests will be subject to attack on constitutional grounds even if there is no disparate impact. *See, e.g.*, Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276 (5th Cir. 1972); Georgia Ass'n of Educators, Inc. v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976). All users, therefore, "are encouraged to use selection procedures which are valid, especially users operating under merit principles." 29 C.F.R. §1607.1(B) (1989).

107. American Psychological Association, Standards for Educational and Psychological Testing (1985) [hereinafter APA Standards]. While the standards are published by the American Psychological Association, they are actually the joint product of three cooperating organizations, the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. The 1985 standards represent modification and extension of similar standards promulgated first in 1966 and revised in 1974.

108. *See* 29 C.F.R. §1607.5(C) (1989) (Uniform Guidelines "intended to be consistent with" APA Standards).

those measures of job performance. For a test to be valid, there must be a statistically significant positive correlation between high test scores and successful performance on the job.[109] There are two types of criterion-related validation: predictive, in which tests are administered to prospective employees and test scores are compared to later job performance, and concurrent, in which tests are administered to incumbent employees and test scores are compared to current job performance. Concurrent validity studies will be most relevant in the context of evaluating present teacher-employees.

A content validity study, according to the Uniform Guidelines, should show that "the content of the [test] is representative of important aspects of performance on the job."[110] This type of validation is appropriate when the test itself closely approximates a sample of work done on the job.[111]

Construct validation applies when the test being validated is used to determine whether the test-taker possesses certain traits or characteristics (constructs) deemed to be important for successful performance of the job.[112] This is the most complex strategy of the three. It is particularly difficult to identify the constructs (general traits, such as intelligence, verbal fluency, or leadership) that are necessary for successful performance of the job, and to ensure that the test accurately measures those constructs.

The Uniform Guidelines and the APA Standards each include a detailed set of technical standards that are to be followed in actually conducting any of the above validation studies. On their face, these standards are very stringent, and there is considerable debate over whether courts should demand strict adherence to them in employee testing cases. Certainly the courts themselves have been inconsistent in their deference to the standards. The future of teacher competency testing, then, may depend in large part upon how exacting the courts are in their demands for test validation.[113]

The United States Supreme Court first addressed the issue of test validation in *Griggs v. Duke Power Co.*[114] where the Court stated that employment tests must be "a reasonable measure of job performance" and suggested that the EEOC's Uniform Guidelines were entitled to "great deference."[115] Following *Griggs*, the Court considered the use of two pre-employment, general ability tests (one designed to test nonverbal intelligence and the other designed to test general verbal ability) in *Albemarle*

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109. 29 C.F.R. §1607.14(B) (1989); APA Standards, *supra* note 5, at 11-12.
110. 29 C.F.R. §1607.5(B) (1989); *see also* APA Standards, *supra* note 5, at 10-11.
111. 29 C.F.R. §1607.14(C)(1) (1989)
112. 29 C.F.R. §1607.5(B) (1989); APA Standards, *supra* note 5, at 9-10.
113. *See* Beckham, *Standardized Examinations as Measure of Teacher Competence*, 30 Educ. L. Rep. 995, 998 (1986).
114. 401 U.S. 424 (1971).
115. *Id.* at 433-34.

Paper Co. v. Moody.[116] The employer in that case had hired an industrial psychologist to validate the job-relatedness of its testing program, but the Supreme Court carefully measured the validation study against the Uniform Guidelines and found it to be defective in several respects. Once again, the Court stated that the guidelines were "entitled to great deference."[117]

The Court's strict application of the Uniform Guidelines in *Albemarle Paper Co.* drew extensive criticism. Indeed, even the American Psychological Association, upon whose standards the Uniform Guidelines were based, joined in the reproach, asserting that an unyielding application of the guidelines would result in "professionally unrealistic and effectively unattainable requirements."[118]

Since *Albemarle Paper Co.*, the courts have displayed little consistency in dealing with the test validation issue. One of the more interesting cases is *United States v. South Carolina*.[119] In that case the Supreme Court summarily affirmed the decision of a three-judge federal district court upholding the use of the National Teacher Examinations (NTE) both for the initial hiring of teachers and for determining pay classifications for current teachers. The district court did address the adequacy of the state's validation efforts and found "ample evidence in the record of the content validity of the NTE."[120] That evidence consisted primarily of indications that the authors of the NTE had conducted their own "exhaustive validation study," and the testimony of experts that in their opinion the study met all the requirements of the APA Standards and the Uniform Guidelines.[121]

One of the primary concerns in the South Carolina case, however, was the administration of the NTE to current teachers for salary purposes. As the district court acknowledged in its opinion, "[t]he NTE do not measure teaching skills, but do measure the content of the academic preparation of *prospective* teachers."[122] The court also conceded that "[t]he statistical studies in the record do not prove that high NTE scores would correlate with high scores on measures of teaching effectiveness."[123] Nonetheless, the testing of current teachers was upheld, in large part because of the lack of alternative measures of teaching effectiveness and the cost-effectiveness of using a national exam.[124]

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116. 422 U.S. 405 (1975).
117. *Id.* at 431 (quoting *Griggs*).
118. Brief for the Division of Industrial-Organizational Psychology of the American Psychological Association as Amicus Curiae at 20, Washington v. Davis, 426 U.S. 229 7(1976), reprinted in 88 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 281, 309 (P. Kurland G. Casper eds. 1977).
119. 434 U.S. 1026 (1978).
120. United States v. South Carolina, 445 F. Supp. 1094, 1108 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).
121. *See* 445 F. Supp. at 1098, 1113.
122. *Id.* at 1108 (emphasis added).
123. *Id.* at 1108 n.13.
124. *See id.* at 1108-09 nn.13-14.

When the *South Carolina* case came before the Supreme Court, two dissenting justices, Justices White and Brennan, took the majority to task for its summary affirmance. They pointed out that the authors of the NTE themselves advised against using the tests to evaluate experienced teachers, and that the authors' validation study did not relate to actual "job performance."[125] Nonetheless, they failed to sway the seven justices who voted to affirm the district court.

It is difficult to know what kind of weight to accord the Supreme Court's decision in *South Carolina* because it was rendered without a majority opinion.[126] However, the decision did seem to signal a more relaxed judicial stance on the validation issue. Certainly the lower court, whose actions were implicitly given a stamp of approval by the Supreme Court, had not engaged in the kind of close comparison between the state's use of the NTE and the application of the Uniform Guidelines that had occurred in *Albemarle Paper Co.*

It is interesting, however, to compare the *South Carolina* case to a similar case decided a year earlier in Georgia. In *Georgia Association of Educators, Inc. v. Nix*,[127] an action was brought against the state of Georgia to prevent the use of a minimum score on the NTE as a prerequisite for a six-year teaching certificate (which carried with it a higher salary than that associated with a four-or five-year certificate). In an opinion almost at polar opposites from the district court opinion in *South Carolina*, the *Nix* court held that Georgia's use of the NTE created an arbitrary classification in violation of the equal protection clause. The principal defect was that "no attempt ha[d] been made by the defendants to validate the use of the NTE. . .with respect to its stated purpose."[128]

The court in Nix (like Justices White and Brennan in their *South Carolina* dissent) focused on the fact that the NTE was designed not to test the job performance of current teachers but "only to measure the undergraduate background academic preparation for prospective teachers."[129] Significantly, the court also appeared to reject the suggestion made in *South Carolina* that the lack of better alternatives may justify the use of a test of questionable merit.[130]

These two cases are not the only ones in which the courts have displayed an inconsistency in dealing with the validation issue. In *Moore v. Tangipahoa Parish School Board*,[131] the Fifth Circuit upheld the termination of a

125. 434 U.S. at 1027-28 (White, J., dissenting).
126. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 764 (1984).
127. 407 F. Supp. 1102 (N.D. Ga. 1976).
128. *Id.* at 1105.
129. *Id.* at 1105, 1108.
130. *See id.* at 1105 n.1.
131. 594 F.2d 489 (5th Cir. 1979).

nontenured high school teacher who refused to take the NTE as a condition of continued employment. In response to the teacher's argument that the NTE was an improper evaluation tool for current teachers, the court simply cited South Carolina for the proposition that the "use of NTE scores in evaluating teachers is generally permissible."[132] The court made no mention of the need for validation of the NTE.

Similarly, in *Newman v. Crews*,[133] the Fourth Circuit upheld the use of NTE scores in determining which teachers received pay raises. Referring to the case as "a close relative of *United States v. South Carolina*," the court relied very heavily on that precedent: "If use of NTE scores is appropriate for the creation and maintenance of salary differentials [one of the holdings of the *South Carolina* case], it is surely appropriate for use in later decisions to increase those differentials."[134] Once again, the opinion included no analysis of the validation issue.

Both *Moore* and *Newman*, then, seemed to assume that once a test has been deemed valid in one case, that validity will carry over into another educational setting. That is not the case, however. As the court correctly pointed out in *York v. Alabama State Board of Education*,[135] "tests are not valid or invalid *per se*, but must be evaluated in the setting in which they are used; the fact that the validity of a particular test has been ruled upon in prior litigation is not necessarily determinative in a different factual setting."[136] *York* also involved a challenge to the use of the NTE, this time as a means of determining which nontenured teachers should be reemployed. The court granted injunctive relief to the plaintiffs, finding no evidence of test validation. Critical to the court was the defendants' apparent "misuse" of the NTE in evaluating current teachers and in using arbitrary cutoff scores without a prior investigation into the consequences of such use.[137]

The case law, then, suggests once more that the extent to which school officials may use tests to evaluate teachers will depend on the rigor with which courts enforce validation standards. Some courts have put some teeth into the validation requirement, while others have essentially ignored it. It does appear that the courts have retreated to some extent from *Albemarle Paper Co.'s* strict application of the EEOC's Uniform Guidelines. However, the validation issue is still of critical legal importance, and school officials must recognize that their use of competency tests to evaluate teachers may be struck down unless serious efforts are made to ensure the validity of

132. *Id.* at 498.
133. 651 F.2d 222 (4th Cir. 1981).
134. *Id.* at 223, 225.
135. 581 F. Supp. 779 (M.D. Ala. 1983).
136. *Id.* at 786.
137. *See id.* at 781, 786.

the tests. Certainly any school district or state education agency contemplating the use of such testing procedures would be well advised to seek the assistance of professional test developers. "[H]omemade methodology" will not satisfy the courts.[138] On the other hand, the validity of any given test is not guaranteed simply because it is professionally produced and commercially available.[139]

B. Potential Constitutional Challenges to Teacher Testing

1. Impairment of Contract

The United States Constitution prohibits states from passing any. . . Law impairing the Obligation of Contracts."[140] It is possible that teachers facing decertification for failure to pass a competency test may challenge such testing requirements on the ground that they impair teachers' contractual rights. Recent case law, however, suggests that teacher testing programs probably would survive such a constitutional challenge.

a. Existence of a Contract

The threshold requirement for success on any contract clause claim is proof of the existence of a contract. If that hurdle is cleared, the next inquiry is whether there has been a "substantial impairment" of the contractual relationship.[141] Most public school teachers, of course, enter into annual employment contracts with their school districts, and there certainly are "contractual" rights and obligations that flow from those contracts. Because these contracts expire at the end of each school term, however, school officials could easily avoid contract clause problems simply by having the dismissals take effect at the end of the academic year after the contract term has expired. As a result, there would be no "impairment" of the contract.

The best hope for teachers, then, would be to base their contract clause challenges either on state tenure laws or on the nature of their teaching certificates. Because the existence of a contractual obligation is governed by state law, a close examination of the relevant state statutes regarding teacher tenure and certification is essential. Some states purport to grant certain teachers tenure, while others reject any form of tenure system. Similarly, some states issue "life" or "permanent" teaching certificates, while

138. This phrase was used by the plaintiffs, and embraced by the court, in York, 581 F. Supp. at 786 n.13.
139. *See* Gillespie v. Wisconsin, 771 F.2d 1035, 1045 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).
140. U.S. Const. art. I, §10, cl. 1.
141. Energy Reserves Group, Inc. v. Kansas Power Light Co., 459 U.S. 400, 411 (1983).

others issue only renewable certificates which may be renewed if the holder meets certain additional requirements.[142]

Obviously, those teachers who have "tenure" or a "life certificate" will have the strongest claim that a testing requirement may impair their contractual rights. But even those teachers will have difficulty prevailing on a contract clause claim. First, it is not at all clear that tenure laws create, or lifetime teaching certificates constitute, a contract between the teacher and the state. Indeed, in recent Texas litigation over teacher competency testing, both propositions seem to have been rejected.

In 1984, the Texas legislature amended the Texas Education Code by adding, among other things, Section 13.047. That statute requires all public school teachers in Texas to pass the Texas Examination for Current Administrators and Teachers (the "TECAT") to retain their certification.[143] Shortly after the law was enacted, the Texas State Teachers Association sued the state, seeking a declaration that the law was unconstitutional. The plaintiff's principal argument was that Section 13.047 violated Article I, Section 16 of the Texas Constitution, which, like the contract clause of the United States Constitution, prohibits laws that impair the obligation of contracts.[144] At the heart of the Teachers Association's claim was its assertion that a Texas teacher's certificate, which includes the language "valid for life, unless cancelled by lawful authority," constituted a contract. The trial court denied the requested relief and the Court of Appeals of Texas affirmed. Though the court of appeals did not decide whether a teacher's certificate was a contract, it did express its "doubt" that teachers' certificates fell within the protections of the contract clause.[145]

That unresolved question was answered less than a year later in *State v. Project Principle, Inc.*,[146] when the Supreme Court of Texas addressed a nearly identical challenge to the constitutionality of Section 13.047. The plaintiff, a nonprofit corporation with a membership made up of certified public school teachers and administrators, argued that teaching certificates were contracts and that Section 13.047 impaired the obligation of those contracts in violation of the contract clause of the state constitution. The Supreme Court of Texas held that the plaintiff had not met the threshold requirement of a contract clause claim—that is, the existence of a contract: "[A] teaching certificate is not a contract . . . Rather, the certificate

142. *See generally* Comment, *Teacher Competency Testing: "Decertification" and the Federal Constitution and Title VII*, 37 Emory L.J. 1077, 1103-07 (1988).

143. Tex. Educ. Code Ann. §13.047 (Vernon Supp. 1987).

144. *See* Texas State Teachers Ass'n v. State, 711 S.W.2d 421, 423 (Tex. Ct. App. 1986).

145. *Id.* at 424.

146. 724 S.W.2d 387 (Tex. 1987).

is a license, and like all licenses, is subject to such future restrictions as the state may reasonably impose."[147]

The *Project Principle* court relied heavily on a 1937 United States Supreme Court decision in *Dodge v. Board of Education*.[148] In that case, a group of retired teachers in Chicago brought a contract clause challenge to an Illinois act which reduced the amount of their retirement annuities. The Supreme Court rejected the claim, holding that there was no legislative intent to create a contract when the Illinois legislature passed the law providing for such annuities. In its opinion, the Court stated a general "presumption" that a law "fixing the term or tenure of a public officer or an employe of a state agency. . . is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise."[149] It is this language that the Texas court in *Project Principle* seized upon in rejecting the plaintiff's challenge to the teacher testing law.

Significantly, the Texas court ignored a Supreme Court opinion decided the year after *Dodge*. In *Indiana ex rel. Anderson v. Brand*,[150] the Court considered the case of a public school teacher who had an "indefinite contract" pursuant to Indiana's Teachers' Tenure Law.[151] The state legislature subsequently repealed that part of the Tenure Law applying to the plaintiff. When her employer threatened to dismiss her, the plaintiff brought suit alleging that the repealing act impaired her indefinite contract and thus violated the contract clause of the United States Constitution. The Supreme Court agreed with her contentions, holding that the Tenure Law did create a contractual obligation which could not be impaired by a repealing statute.

The *Brand* case, then, stands for the proposition that state laws regarding tenure and certification of teachers may create contractual obligations, in which case state actions adversely impacting on one's teaching status (such as decertification as a result of failure of a competency test) could run afoul of the contract clause. *Brand* arguably is more persuasive than the *Dodge* decision relied upon by the Texas court because it dealt with the status of a current teacher rather than the annuities of retired teachers.

The Court's holding in *Brand* was based in large part on the *language* of the Teachers' Tenure Act, which used the word "contract" several times in defining the tenure status of teachers.[152] Therefore, school officials would

147. *Id.* at 390.
148. 302 U.S. 74 (1937).
149. *Id.* at 79.
150. 303 U.S. 95 (1938).
151. The indefinite contract essentially gave the teacher "tenure"; her teaching contract could be cancelled only for limited reasons specified in the Tenure Law. *Id.* at 97.
152. *See id.* at 105.

be well advised to consider the wording of their own tenure and certification provisions before they institute a teacher testing program. If those provisions are phrased in "contract" terms, a teacher-plaintiff may be able to establish the existence of a contract.

But even if a court accepts the proposition that a teaching certificate is a contract, or that state tenure laws create contractual obligations, the plaintiff still would have to establish that a testing requirement amounts to an "impairment" of the contract. Moreover, despite the literal language of the contract clause, a state may impair contractual obligations if the impairment is reasonably designed to further some important government interest.

b. Impairment of the Contract

In some circumstances, the "impairment" requirement probably would be satisfied easily. For example, if teachers with life "tenure" or "life certificates" were to be decertified for failure to pass a competency exam, it would seem clear that their contractual rights would be impaired (assuming, once again, that there is a contract). On the other hand, would the denial of a pay raise due to a low exam score amount to a significant impairment of a teacher's contract? What is important in this context is the level of the impairment. The United States Supreme Court has made it clear that in contract clause cases, the "severity of the impairment" will determine the "level of scrutiny" to which the state action will be subjected.[153] While the decertification of a tenured teacher presumably would warrant a high level of judicial scrutiny, actions with a lesser impact, particularly those directed toward nontenured teachers, would be entitled to more deference.[154]

Reasonableness of the Impairment

Even if a teacher-plaintiff could clear the first two hurdles in a contract clause challenge by establishing (1) the existence of a contract and (2) a substantial impairment of that contract resulting from the competency testing program, it is still unlikely that the plaintiff would prevail. That is because the state can justify a contract impairment by showing that it is a reasonable means of furthering some important public purpose.

"[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."[155] Instead, it must be balanced against the state's interest in promoting the general welfare of its citizens.

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153. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504 n.31 (1987); Energy Reserves Group, Inc. v. Kansas Power Light Co., 459 U.S. 400, 411 (1983).

154. Georgia, unlike Texas, exempted teachers with life certificates from its competency testing requirement. Ga. Code Ann. §20-2-200(b)(5) (Supp. 1988), and thus far has avoided contract clause challenges.

155. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502.

Thus, if the state can show that a "significant and legitimate public purpose" underlies its action, even a substantial impairment may stand.[156]

The purpose underlying a teacher-testing program presumably is to enhance the quality of public education by improving the competency of the teachers who are tested. Surely this is a "significant and legitimate" objective, and courts undoubtedly will have little difficulty justifying testing programs on this basis. The *Texas State Teachers Association* case is a good example. The court in that case assumed for the purpose of argument that the competency testing requirement impaired teachers' contract rights, but easily justified the impairment as an incident to the state's valid exercise of its power to regulate the teaching profession and to establish and maintain a public school system.[157]

A recent Connecticut case is also instructive, although it did not deal specifically with competency testing. In *Connecticut Education Association, Inc. v. Tirozzi*,[158] plaintiffs challenged a state statute that invalidated all permanent teaching certificates and substituted in their place five-year certificates renewable upon successful completion of continuing education units. In reviewing this statute, the Supreme Court of Connecticut found no need to determine whether the first two requirements of a contract clause claim were satisfied. The court held that even if it were to conclude that the statute substantially impaired the plaintiffs' contractual relationships, "the act has the significant, legitimate purpose of upgrading the state's public education system."[159]

Though it will not be difficult to identify a legitimate public purpose underlying a teacher testing program, a caveat is in order: "the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations."[160] The impairment also must be *reasonable*, and it must truly serve the public purpose it is intended to serve. In view of the courts' traditional deference to the judgment of state officials as to "the necessity and reasonableness of a particular measure,"[161] it may well be that this requirement is not a serious impediment. However, the issue of test validity again must be considered. If school officials are evaluating teachers on the basis of a competency exam that has not been properly validated, a strong argument could be made that such testing requirements are not *reasonably designed* to achieve the broader policy goal of improving the public education system.

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156. *See id.* at 1251-52; *Energy Reserves Group*, 459 U.S. at 410-412; *Texas State Teachers Ass'n*, 711 S.W.2d at 424.
157. 711 S.W.2d at 425.
158. 554 A.2d 1065 (Conn. 1989).
159. *Id.* at 1074.
160. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505.
161. *Id.*

In the final analysis, contract clause challenges to teacher testing programs appear destined to fail. Even if courts are willing to find the existence of contractual obligations (which, in light of the Texas experience, is questionable), the important public purpose underlying such testing programs—improving the quality of public education—probably will be enough to justify any impairment that occurs.

2. Procedural Due Process

The United States Constitution prohibits states from depriving any person of "life, liberty, or property, without due process of law."[162] To establish a procedural due process violation, a plaintiff must first show that he or she has a protected liberty or property interest. Once that has been shown, "the question remains what process is due"[163]—that is, what procedures are necessary to ensure "due process of law." In the context of teacher competency testing, there may be strong arguments that a teacher's interest in continued certification and employment implicates both liberty and property interests. Therefore, school officials contemplating the use of a teacher testing program must strive for basic fairness in the procedures by which the program is administered.

a. Liberty Interest

In *Board of Regents v. Roth*,[164] the United States Supreme Court considered the procedural due process challenge of a nontenured university professor who was informed that he would not be rehired for the following academic year. The university gave the professor no reason for its decision and no opportunity to challenge the decision at any sort of hearing. The Court stated that the range of "liberty" interests protected by the due process clause was "broad indeed." However, without some evidence that the professor's "good name, reputation, honor, or integrity" had been impugned, or that the university's decision not to reemploy the professor "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," the professor could not establish a protected liberty interest.[165]

It is unlikely that a teacher challenging a competency test could establish a liberty interest based on the first of the *Roth* alternatives. An adverse employment decision grounded solely on the teacher's failure to pass a competency test does not call into question the teacher's "good name, reputation, honor, or integrity," at least as contemplated by Roth.[166] Moreover,

162. U.S. Const. amend. XIV, §1.
163. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
164. 408 U.S. 564 (1972).
165. *Id.* at 572-73.
166. *Id.* at 573 & n.12.

many courts have held that even termination does not constitute a deprivation of an employee's "liberty" unless the employer publicly discloses the reasons for the dismissal.[167] Therefore, school officials could avoid this type of due process challenge simply by refusing to publicize the reasons for an individual's termination.

Roth's second alternative warrants further scrutiny. In determining whether one has a liberty interest, the focus is not on whether an employee has the right to continue in his or her present position, but whether the employee has the freedom to seek other suitable employment. And in the view of the Court in *Roth*, "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[168] However, a teacher who is decertified for failure to pass a competency exam is not as "free as before" to seek another teaching job. Because certification generally is a prerequisite for any public teaching position, a teacher who is decertified for failing a mandatory competency test will be unable to seek similar employment within that state. Moreover, even if the teacher had the freedom to move to another state, he or she probably would be faced with the prospect of having to pass a similar competency test in the new state, since most states now require passage of such a test for initial certification purposes.[169]

It is entirely possible, then, that a teacher who is adversely affected by a testing requirement could establish a liberty interest sufficient to invoke procedural due process, at least if the test results are used for the purpose of decertification rather than some milder employment action such as denial of a pay raise.

b. Property Interest

A teacher challenging a competency test on procedural due process grounds may be more successful establishing a property interest than a liberty interest. To have a protected property interest in some benefit (such as continued employment), one must have "a legitimate claim of entitlement" to it.[170] That claim of entitlement must derive from some source independent of the Constitution, such as a written or implied contract, a state statute, a local ordinance or rule, or some "mutually explicit understanding" between the relevant parties.[171]

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167. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 348 (1976); Dickeson v. Quarberg, 844 F.2d 1435, 1440 (10th Cir. 1988); Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1069 (6th Cir. 1984); Goetz v. Windsor Cent. School Dist., 698 F.2d 606, 610 (2d Cir. 1983).

168. 408 U.S. at 575.

169. *See* Comment, *supra* note 40, at 1085-86.

170. *Roth*, 408 U.S. at 577.

171. *See id.*; Perry v. Sindermann, 408 U.S. 593, 601 (1972).

In *Roth*, the case in which the Supreme Court first set forth the above standard, the Court held that a nontenured university professor did not have a protected property interest in continued employment. He had been hired specifically for a one-year term, and there was nothing in his notice of appointment, any state statute, or any university rule or policy to suggest that the plaintiff would be rehired for another term. Thus, the professor had "no possible claim of entitlement to re-employment," and the university was not required to give him a hearing when it decided not to renew his contract.[172]

The Court in *Roth* implicitly suggested that a tenured teacher will always be entitled to procedural due process prior to termination or decertification, a stance reaffirmed in the companion case of *Perry v. Sindermann*.[173] The *Perry* Court also made clear, however, that under certain circumstances even nontenured teachers may have the same claim of entitlement. The policies and practices of the school may effectively create a "*de facto* tenure program—that is, "an unwritten 'common law'. . . that certain employees shall have the equivalent of tenure."[174] In *Perry*, for example, the plaintiff had been a teacher in the Texas state college system for ten years, under a series of one-year contracts. Even though his latest employer had no formal tenure system, the plaintiff claimed reliance on certain college and state guidelines which suggested that a teacher in plaintiff's position should enjoy the benefits of tenure. The Supreme Court agreed with the plaintiff that if he could prove the existence of such "rules and understandings, promulgated and fostered by state officials," he could establish a legitimate claim of entitlement to continued employment.[175]

The Court also has held that the existence of state statutes listing specific reasons for which a public employee may be dismissed may be enough to create a property interest. In *Cleveland Board of Education v. Loudermill*,[176] the Court considered the due process challenge of a school security guard who was terminated for dishonesty in filling out his employment application. The guard was given no opportunity to respond to the charge, nor was he granted any kind of hearing prior to his dismissal. In addressing the "property interest" issue, the Court concluded that the relevant Ohio statute "plainly create[d] such an interest" in the plaintiff because it specifically set forth the grounds for a dismissal: such an employee could be dismissed for "incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public,

172. 408 U.S. at 578.
173. 408 U.S. 593, 601 (1972).
174. *See id.* at 600-02.
175. *Id.* at 602.
176. 470 U.S. 532 (1985).

neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."[177]

Connecticut Education Association, Inc. v. Tirozzi[178] also provides a good example. In that case, the Supreme Court of Connecticut held that the rights of public school teachers in their teaching certificates constitute protected property interests because a Connecticut statute declares that a teacher's certificate can be revoked only "for cause." Even though the types of "cause" justifying a dismissal were not set forth in detail as they were in Loudermill, the statutory language was enough to invoke the due process clause: "A teacher who is given by statute the right to continued employment except upon a showing of cause. . .acquires a property right that is entitled to protection under the due process clause."[179]

Project Principle is the only teacher testing case to date that has specifically included a procedural due process challenge. The Supreme Court of Texas addressed the procedural protections available to teachers facing decertification for failure to pass the TECAT and concluded that such teachers were afforded procedural due process.[180] The court did not explicitly address the antecedent issue of whether these teachers possessed a protected property interest. Its analysis, however, seems to assume such a property interest does exist. It is interesting to note that Texas, like Connecticut and many other states, lists specific reasons in its statutes for the revocation of a teaching certificate.[181]

It seems likely, then, that many teachers whose certification is threatened by a mandatory competency test would be able to establish a property interest sufficient to support a procedural due process challenge. Certainly tenured teachers have a property interest in continued employment. Nontenured teachers similarly would have a property interest in their yearly employment contracts, so they would be entitled to procedural due process with respect to actions taken during their contract terms. And even if no adverse action is taken until after the contract term expires, the nontenured teacher may be able to establish a property interest based on statutory language, local policies, or mutual "understandings" between teacher and employer. School officials must be aware of all these potential sources from which a property interest may emanate and realize that they may suffer the consequences if they "lead on" nontenured employees and then pull the rug out from under them through the use of a competency test.

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177. *Id.* at 538-39 & n.4.
178. 554 A.2d 1065 (Conn. 1989).
179. *Id.* at 1070 (quoting Lee v. Board of Educ., 434 A.2d 333 (Conn. 1980)).
180. *See* 724 S.W.2d at 391.
181. *See* Tex. Educ. Code Ann. §13.046 (Vernon Supp. 1987).

c. What Process Is Due?

The conclusion that a teacher-plaintiff has a constitutionally protected liberty or property interest does not, of course, establish a due process violation. " '[T]he question remains what process is due.' "[182] In other words, even if a teacher establishes a liberty or property interest, that does not mean the teacher cannot be terminated for failure to pass a competency examination. It simply means that school officials must afford the teacher some procedural protections prior to dismissal.

What constitutes "due process" will vary depending on the factual setting. However, the "root requirement" of the due process clause is that individuals be given notice and "some kind of a hearing" before they are deprived of significant liberty or property interests.[183] Success on a procedural due process claim, then, will depend on the court's vision of the "notice and hearing" requirement.

The notice aspect has yet to be specifically addressed in the context of dismissal of teachers for failure to pass a competency exam, but an analogy may be drawn to the area of student competency testing. In *Debra P. v. Turlington*,[184] a group of Florida high school students brought suit challenging the constitutionality of a functional literacy examination which students were required to pass before they could receive a high school diploma. The Fifth Circuit first held that the students' expectation that they would receive a diploma upon successful completion of their high school coursework was a protected property interest. It then went on to find that "the abrupt [testing] schedule" imposed on current high school students acted as a "deprivation of property rights without adequate notice."[185] The court upheld the trial court's injunction against use of the test for four years, to give the students an adequate period of time to orient themselves to the new testing requirement and to prepare for the exam.

Surely the notice aspect of the due process requirement is equally applicable to the competency testing of teachers. Current teachers must have adequate notice of testing requirements so they will have sufficient lead time to prepare for the examination. Two of the states that have imposed testing requirements on currently certified teachers recognized the need for this lead time by including it in their statutes. Arkansas passed its competency test statute in October 1983, but gave teachers until June

182. *Loudermill*, 470 U.S. at 541 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
183. *See Loudermill*, 470 U.S. at 542.
184. 644 F.2d 397 (5th Cir. 1981).
185. *Id.* at 404.

1, 1987 to pass the exam.[186] The Texas statute enacted in July 1984 required teachers to pass the TECAT by June 30, 1986 to retain their certification.[187]

An estimate of the exact time period a court may require in any given case would be speculative at best, but one should recognize that the four-year notice period mandated in *Debra P.* for student competency testing does not necessarily carry over to teacher testing programs. As one pair of commentators has suggested, currently employed teachers may, "by virtue of their employment, be presumed to have attained at least threshold levels of competency, whereas students are more easily viewed as still in the process of fulfilling the requirements for minimal competency."[188] Therefore, teachers may not need as much preparation time as students.

The length of the notice period may be influenced by the other procedural protections afforded under the testing program. In other words, if state legislators or school officials include additional procedures in their programs to ensure that teachers will not be unfairly evaluated, they may be able to avoid due process problems even if the notice period is relatively short. For example, one of the factors that was important to the eventual decision in *Debra P.* to sustain the validity of the student competency test itself was the opportunity for students to retake the exam after they failed it initially.[189]

That same factor has played a significant role in teacher testing cases. The Texas Supreme Court in *Project Principle* rejected the plaintiff's procedural due process challenge in part because the statute provided that "each teacher must be given more than one opportunity to perform satisfactorily" on the TECAT.[190] Similarly, in *Alba v. Los Angeles Unified School District*,[191] a group of probationary teachers challenged a school district requirement that they pass the district's secondary social studies subject field examination as a condition of continued employment. The California Court of Appeal upheld the use of the exam, noting that each of the plaintiffs had more than one opportunity to pass the test and none of them was prevented from retaking the test in the future.[192]

Another important factor, to be considered in conjunction with a retesting procedure, is the opportunity for a teacher who fails a competency test

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186. Swiger & Zehr, *The Search for Excellence: Legal Issues in Teacher Competency Testing*, 16 Urb. Law. 745, 749 (1984).

187. Texas State Teachers Ass'n v. State, 711 S.W.2d 421, 422 (Tex. Ct. App. 1986).

188. Swiger & Zehr, *supra* note 84, at 753.

189. Debra P. v. Turlington, 564 F. Supp. 177, 185 (M.D. Fla. 1983) (students given five chances to pass exam between 10th and 12th grades), on remand from 644 F.2d 397 (5th Cir. 1981).

190. *See* 724 S.W.2d at 391; Tex. Educ. Code Ann.§13.047(f) (Vernon Supp. 1987). The Georgia testing statute provides that a teacher "shall have at least three opportunities" to pass the competency Ann. §20-2-200(b)(4) (Supp. 1987).

191. Cal. App. 3d 997, 189 Cal. Rptr. 897 (1983).

192. *Id.* at 1006, 189 Cal. Rptr. at 903.

to obtain remedial help to correct deficiencies. Again, this was important to the *Debra P.* court in the student testing context,[193] and it has been recognized in state statutory testing programs. For example, the Georgia statute specifically states that a current teacher who fails a competency test "may request and thereby shall be provided staff development assistance in the areas of identified deficiencies."[194] Arkansas likewise provides for an opportunity to participate in remedial programs.[195] The original Texas statute required school districts to provide teachers with an opportunity for remedial aid, but that provision was repealed in 1987.[196]

School officials should also be aware of another notice-related issue that has arisen in the teacher testing context. Part of the plaintiffs' complaint in the *Alba* case was that the school district provided a misleading description of the test that was to be administered, and therefore the teachers had no fair notice of the subject areas on which they would be tested. The district's description of the social studies exam stated that it covered "United States history, government, and geography, world history and geography, economics, international relations and current affairs, and methods and techniques of teaching social science." When the test was actually administered, however, it did not include any questions regarding "current affairs" or "methods and techniques of teaching social science." That discrepancy was enough for the trial court to find the school district's action "arbitrary and capricious," and to order the district to set aside its decision dismissing the plaintiffs. The court agreed with the findings of an administrative law judge that the teachers "could not have effectively and competently prepared for the examination and may have spent a disproportionate amount of time studying areas in which no questions were asked."[197] On appeal, however, the California Court of Appeal reversed the trial court, finding no evidence that the plaintiffs relied on the examination description or would have passed if all listed subject areas had been included in the exam.[198]

Despite the ultimate victory for the school district in *Alba*, the lesson remains that school officials contemplating the use of a teacher competency test may face a legal challenge if they do not provide sufficient advance information regarding the test to allow teachers to prepare effectively. Accurate and complete information, together with an adequate time period

193. *See* 564 F. Supp. at 185 (noting that students who fail the exam may stay in school and receive "special instruction").
194. Ga. Code Ann. §20-2-200(b)(4) (Supp. 1987).
195. Ark. Code Ann. §6-17-601 (1987).
196. 1987 Tex. Sess. Law Serv. 134 (Vernon).
197. 140 Cal. App. 3d at 1000-04, 189 Cal. Rptr. at 899-902.
198. *See* id. at 1005-06, 189 Cal. Rptr. at 902-03.

for preparation and opportunities for retesting and remedial assistance, will go far toward avoiding procedural due process claims.

School officials would also be well advised to provide teachers with the opportunity for "some kind of a hearing" prior to dismissal or decertification for failure to pass a competency exam. Most states already have laws governing the procedural protections to be afforded public employees aggrieved by some state action. In the *Project Principle* case, for example, the court noted that under the Texas Administrative Code a teacher who is decertified for failure to pass the TECAT is entitled to an administrative appeal to the state commissioner of education, followed by judicial review in a district court. The court concluded that "[t]his review provides procedural due process to any teacher who fails to perform satisfactorily on a competency examination."[199]

The "hearing" provided to the teacher need not be elaborate, but it should at least give the teacher an opportunity to be heard prior to dismissal. As the Supreme Court stated in *Loudermill*, "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."[200] It may well be that in the competency testing context the only issue for a hearing would be the correct scoring of the exam. If that is the case, it is doubtful that the hearing would be very burdensome on the school officials, but it is also doubtful that the hearing would be of much practical value.[201] On the other hand, the hearing may provide the teacher with an opportunity to challenge the validity of the exam or the conditions surrounding the administration of the exam, in which case the opportunity to be heard may be of considerable importance.

One final comment regarding procedural due process is in order. The above discussion focuses on due process challenges grounded on the United States Constitution. School officials also must be aware of the procedural protections afforded under state and local laws. For example, in a recent Georgia case, a provisionally certified teacher who had been decertified for failure to pass a competency exam was reinstated by the court because the testing requirement was not enacted in accordance with the state's Administrative Procedure Act.[202] Similarly, the Texas teacher competency exam was challenged on the ground that it tested only literacy, while the statute authorizing the exam contemplated testing of both literacy and

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199. 724 S.W.2d at 391.

200. *See* 470 U.S. at 545-46.

201. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

202. Department of Educ. v. Kitchens, 193 Ga. App. 229, 387 S.E.2d 579 (1989), *cert. denied*, 259 Ga. 791, 389 S.E.2d 244 (1990).

subject area knowledge. Thus, it was argued, no teacher could be decertified solely for failure to pass a literacy test.[203] While this claim ultimately failed, it provides another good example of how state laws may affect the "procedure" issue. School officials must realize that state and local procedures often are broader than the federal constitutional guarantees, yet they must be adhered to just as faithfully.

3. Substantive Due Process

[T]he Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions."[204] Therefore, it is possible that a teacher whose employment status is adversely affected due to failure of a competency exam may challenge the testing program on substantive due process grounds, even though the teacher has been afforded all necessary procedural protections. As long as the competency test has been properly validated, however, it is unlikely that such a challenge would succeed.

Under traditional substantive due process analysis, the only government actions to receive serious judicial scrutiny are those that impact on a person's "fundamental rights." If fundamental rights are not implicated, the government action will be upheld as long as it is rationally related to some legitimate government interest.[205] Those rights that have been recognized by the courts as "fundamental" are very limited, and they will not be implicated in a teacher testing case. In *Harrah Independent School District v. Martin*,[206] the United States Supreme Court considered the case of a tenured teacher who was dismissed for refusing to complete required continuing education credits. The Court held that the teacher's interest in continued employment did not involve a fundamental right and, applying the "rational relationship" standard to the school district's action, rejected the teacher's substantive due process claim.

Teacher testing programs likewise will be judged on the basis of this deferential standard. Such programs will be presumed valid, so the burden will be on the teacher to show that there is no rational relationship between the test and some legitimate government interest. There can be no doubt that a legitimate objective—improving the quality of public education by ensuring the competence of teachers—underlies the use of competency tests. Therefore, any hope of success for a teacher-plaintiff must

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203. *Project Principle*, 724 S.W.2d at 392; *Texas State Teachers Ass'n*, 711 S.W.2d at 426.
204. Harrah Indep. School Dist. v. Martin, 440 U.S. 194, 197 (1979).
205. *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law §11.4, at 351-59 (3d ed. 1986).
206. 440 U.S. 194 (1979).

rest on an argument that the competency test being used is not rationally designed to achieve that concededly legitimate objective. In other words, the school officials' use of the test is so irrational or "arbitrary" that it violates the fundamental fairness standard embodied in the due process clause.[207]

It may well be that the teacher's burden is insurmountable, particularly in light of the deference courts accord educational policymakers. Certainly the courts that have considered substantive due process claims in the context of teacher testing have dismissed such claims with little effort. In *Project Principle*, for example, the Supreme Court of Texas rejected the plaintiff's substantive due process claim with a single sentence: "[T]eacher testing is a rational means of achieving the legitimate state objective of ensuring that public school educators meet specified standards of competency."[208] In a related context, the Supreme Court of Connecticut, reviewing legislation that required teachers to give up their "permanent" teaching certificates in exchange for five-year certificates renewable on completion of continuing education courses, rejected the plaintiffs' substantive due process challenge with the simple statement that it was not arbitrary or irrational for the Connecticut legislature to try to improve the quality of the state's educational system by requiring even permanent teachers to sharpen their educational skills."[209]

School officials should not, however, feel completely shielded from substantive due process claims. If courts consider the validity of the tests being used (an issue not addressed in *Project Principle*), testing programs may be vulnerable even under the rational relationship standard. Some courts have recognized that if a test is invalid, it will not be "rationally" related to the goal of improving teacher competency. In *United States v. South Carolina*, for example, the court upheld the use of the National Teacher Examinations for determining salaries of current teachers. It did so, however, only after considering whether the exams themselves bore "a fair and substantial relationship" to the objective of improving the quality of public school teaching.[210]

The central importance of the validity of the testing device, then, is apparent in the substantive due process analysis. School officials once again must make every effort to ensure that the tests being used measure what they are intended to measure. Even with that caveat, however, substantive due

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207. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981).

208. 724 S.W.2d at 391. *See also* Newman v. Crews, 651 F.2d 222, 225-26 (4th Cir. 1981) (rejecting due process challenge to use of NTE for salary determinations); United States v. South Carolina, 445 F. Supp. 1094, 71107-09 (D.S.C. 1977) (same), *aff'd mem.*, 434 U.S. 756 (1978).

209. Connecticut Educ. Ass'n, Inc. v. Tirozzi, 554 A.2d 1065, 1072 (Conn. 1989).

210. *See* 445 F. Supp. at 1108 (noting that there was "ample evidence in the record of the content validity of the NTE).

process challenges are likely to fail. Most courts will defer to the judgments of school officials in their testing efforts. Certainly the *South Carolina* court did not impose strict validation standards. Indeed, the court even suggested that the validity of a test should be balanced against its cost-effectiveness, thereby putting its imprimatur on the use of a nationally distributed, commercially available test.[211] If that opinion is any indication, it seems unlikely that a court would find a school district's use of a particular competency test to be arbitrary and irrational.

4. Equal Protection

The equal protection clause of the Fourteenth Amendment prohibits states from denying to any person within their jurisdiction "the equal protection of the laws."[212] Essentially, this mandates that "all persons similarly situated should be treated alike."[213] Several challenges to teacher testing requirements have been made pursuant to the equal protection clause, on the theory that such tests unconstitutionally classify those who fail the tests differently from those who pass the tests. Few such challenges, however, have been successful, and it is unlikely that equal protection claims will fare any better than other constitutional claims.

In general, equal protection claims are judged on the same basis as substantive due process claims—that is, the state action is presumed to be valid and will be sustained as long as the resulting classification is rationally related to a legitimate government interest.[214] As suggested, few testing programs would seem to be vulnerable under such a deferential standard. The Texas court in *Project Principle*, for example, had as little difficulty disposing of the plaintiff's equal protection claim as it did its substantive due process claim. After determining that the "rational basis" standard applied, the court's analysis once again consisted of a single sentence: "[C]ompetency testing bears a rational relation to the legitimate state objective of maintaining competent teachers in the public schools."[215]

Again, however, teacher testing programs are still open to attack if they have not been properly validated. As the court in *Debra P.* stated in considering an equal protection challenge to a student competency test, "[i]f the test is not fair, it cannot be said to be rationally related to a state interest."[216] Several courts have recognized the importance of test validity

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211. *See id.* at 1109 & n.14 (referring to the NTE as a "reliable and economical means for measuring . . . effective teaching," and asserting that the state had a duty to provide its public school students with the best available teachers "in keeping with *its financial ability to do so*") (emphasis added).

212. U.S. Const. amend. XIV, §1.

213. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

214. *Id.* at 440.

215. 724 SW2d at 391.

216. 644 F2d at 406.

when addressing equal protection claims, and school officials must recognize it as well. Although most courts (assuming they even consider the test validity issue) probably will view testing programs as deferentially as did the court in *South Carolina*, at least two federal courts have struck down teacher testing programs as violative of the equal protection clause. In both cases, the courts held that the tests were not rationally related to the purpose for which they were being used.

In *Armstead v. Starkville Municipal Separate School District*,[217] the Fifth Circuit considered a school board requirement that incumbent teachers achieve a certain score, or rank in the 50th percentile or higher, on the Graduate Record Examination (GRE) to retain their employment. The court first noted that the GRE was "designed to assist graduate schools in the selection of students for graduate study, . . . not . . . for the purpose of identifying those who are or will be competent teachers at the primary and secondary level." It then observed that neither the test developers nor the school district had conducted any validation studies to demonstrate a correlation between high GRE scores and teacher competency. As a result, even though the school board's "desire to employ the best teachers available [was] both legitimate and commendable," its use of the GRE was not rationally related to achieving that objective.[218]

Similarly, in *Georgia Association of Educators, Inc. v. Nix*,[219] a federal district court held that Georgia's use of a minimum score on the NTE as a prerequisite for a six-year teaching certificate (which carried with it a higher salary than that associated with other types of certificates) created an arbitrary classification in violation of the equal protection clause. The same defects noted in *Armstead* also existed in the Georgia case: the NTE was designed to measure the academic background of prospective teachers, not to test the job performance of current teachers, and the defendants had made no attempt to validate the use of the NTE with respect to assessing teacher competency.[220]

The lesson of these two cases, once again, is to pay attention to the test validation issue. Despite the admirable goal of improving the quality of teaching, and despite the courts' traditional deference to educational policymakers, some courts may demand substantial validation efforts. As a reminder, school officials might keep in mind the pointed observation of the court in *Georgia Association of Educators*:

> Defendants apparently feel that the existence of a valid stated purpose for the [test] is all that is necessary to justify its use. They have

217. 461 F.2d 276 (5th Cir. 1972).
218. *Id.* at 279.
219. 407 F. Supp. 1102 (N.D. Ga. 1976).
220. *See id.* at 1108.

> totally failed to come to grips with the fact that if a test in no way accomplishes that purpose or is in no way related to that purpose, then the use of the test is improper.[221]

Nonetheless, the holdings in *Armstead* and *Georgia Association of Educators* are rarities. Most state action is upheld under a rational relationship standard, and therefore teacher-plaintiffs will strive to convince courts to subject testing requirements to heightened scrutiny. Under traditional equal protection principles, a "strict scrutiny" analysis (in which state action will be upheld only if it is narrowly tailored to serve a compelling state interest) applies only if the challenged action interferes with a "fundamental right" or discriminates against a "suspect class."[222]

Neither of these conditions is likely to be met in a teacher testing case. As noted above, the Supreme Court has held that even a tenured teacher's interest in continued employment does not involve a fundamental right.[223] The same issue arose in the *Project Principle* case. In challenging the TECAT on equal protection grounds, the plaintiff teachers organization argued that strict scrutiny was applicable because the classsification (of those who failed the test versus those who passed) impinged on "a fundamental right, the right to practice a profession." The court specifically rejected the argument, holding that "a person's interest in teaching is not a fundamental right" and sustaining the TECAT under a "rational basis" standard.[224]

In several cases, plaintiffs have argued for strict scrutiny of teacher testing programs on the ground that they discriminate against racial minorities. It is well established that many competency tests have had a disproportionate impact on minorities,[225] and there is no question that classifications based on race are "suspect." However, competency tests are not discriminatory on their face, and the United States Supreme Court has made it clear that to prevail on such an equal protection claim a plaintiff must prove the defendants acted with an intent to discriminate.[226] In other words, a disproportionate racial impact, standing alone, will not establish a constitutional violation; there must be a discriminatory purpose underlying the state action.

One would certainly hope that school officials, in implementing a competency testing program, would be motivated solely by a desire to improve

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221. *Id.* at 1107 n.3.
222. *See* Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481, 2487 (1988).
223. *See supra* text accompanying notes 103-04.
224. 724 S.W.2d at 391.
225. *See infra* text accompanying notes 133-40.
226. *See* Washington v. Davis, 426 U.S. 229, 244-45 (1976).

the quality of teaching, not to minimize the number of minority teachers in a school system. Unfortunately, that has not always been the case. In *Baker v. Columbus Municipal Separate School District*,[227] the Fifth Circuit found that the school district's use of the NTE for hiring and retaining teachers violated the equal protection clause because the district "acted with the purpose of barring proportionately more black teachers than white teachers from employment and re-employment."[228]

In most teacher testing cases, particularly in the 1990's, it will be very difficult for a plaintiff to prove discriminatory intent. Nonetheless, school officials contemplating the use of a testing program must be sensitive to the discrimination issue and make every effort to reduce any disproportionate impact resulting from such programs. Not only will it help them avoid title VII challenges (addressed below), but it will forestall attempts to prove discriminatory intent in an equal protection case. One must realize that a plaintiff bringing an equal protection claim need not have direct evidence of discriminatory intent; a court may infer such intent from circumstantial evidence. And the Supreme Court has held that a racially discriminatory *impact* may provide "an important starting point" in determining whether a discriminatory purpose motivated the defendants' actions.[229]

One way to help guard against equal protection claims is to ensure the representation of minority interests in the planning process prior to implementation of a testing program. For example, in upholding the use of a teacher competency test in *Alba v. Los Angeles Unified School District*, the California Court of Appeal specifically noted that in putting together a committee to formulate the test, "[e]fforts were made to establish a male-female and ethnic balance on the committee, as well as representation of all geographical areas within the District."[230] Similarly, in *Allen v. Alabama State Board of Education*,[231] the court considered a race discrimination claim brought against the Alabama Initial Teacher Certification Testing Program, which tested prospective teachers. The court's opinion focuses on the parties' settlement agreement, which provided for the appointment not only of a panel "to judge the racial effect" of the exam, but also of "panels of black Alabama educators" to review the exam for "racial bias."[232] Similar advance planning, with a sensitivity toward minority

227. 462 F.2d 1112 (5th Cir. 1972).
228. *Id.* at 1115.
229. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
230. 140 Cal. App. 3d 997, 1000, 189 Cal. Rptr. 897, 899 (1983).
231. 612 F. Supp. 1046 (M.D. Ala. 1985), *vacated on reh'g on other grounds*, 636 F. Supp. 64 (M.D. Ala. 1986), *rev'd*, 816 F.2d 575 (11th Cir. 1987).
232. 612 F. Supp. at 1052-53.

concerns, could help other school officials avoid accusations of race discrimination.

The bottom line is that equal protection challenges to teacher testing programs are likely to fail. No "fundamental rights" are involved, and it will be very difficult for a plaintiff to prove that a discriminatory intent motivated the testing decision. As a result, testing programs will be judged under the deferential rational relationship standard, under which the burden falls on the plaintiff to show the absence of a rational relationship between the competency test and the legitimate interest in improving teacher quality. As long as a reasonable effort has been made to validate the test, this burden on the plaintiff will be onerous indeed.

C. Testing and Discrimination

A teacher testing program that impacts disproportionately on some identifiable group is susceptible to charges of discrimination. Several federal statutes address employment discrimination generally. Therefore, in addition to the potential constitutional challenges to competency tests, a teacher may assert a statutory claim based on allegations of discrimination. The most common statutory challenge has been one based on title VII of the Civil Rights Act of 1964, but other statutes may come into play as well.

1. Title VII: Racial Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their race, color, religion, sex, or national origin.[233] No sex discrimination claims have been made against teacher testing programs, presumably because there is no evidence that members of one sex fail the tests appreciably more than members of the other. Claims of racial discrimination, however, have been prevalent, and it is this area in which school officials must exercise considerable caution in administering competency tests.

Two distinct theories have been recognized in title VII jurisprudence—"disparate treatment" and "disparate impact." A disparate treatment claim is similar to an equal protection claim in that the plaintiff must prove the employer's subjective intent to discriminate. A disparate impact claim, however, can be sustained without proof of discriminatory intent.[234] Because teachers would have considerable difficulty proving a competency test has been implemented with the intent to discriminate against minorities, their most promising strategy would be a title VII claim based on disparate impact.

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233. 42 U.S.C. §2000e-2(a) (1982).
234. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2119 (1989).

a. Disparate Impact

A disparate impact claim under title VII is directed toward an employment practice that is facially neutral in its treatment of different groups of employees, but in fact impacts more harshly on one group than another. Teacher testing programs often fit within this category. Certainly they are neutral on their face—no racial group is explicitly singled out for differential treatment. However, a litany of cases can be recited in which testing programs have had a disproportionate impact on minorities.

In *Baker v. Columbus Municipal Separate School District*, the school district required new teachers to attain a minimum score on the NTE to keep their positions. Of 18 black teachers who were required to take the test, only one achieved the minimum score. On the other hand, 64 of 73 white teachers met the requirement.[235] The same school district had used the NTE in prior years to determine which teachers were entitled to merit pay increases, with the same racially disproportionate results.[236]

Newman v. Crews and *United States v. South Carolina* also involved the use of the NTE for determining pay raises. Teachers were placed in different classifications, with varying salary levels, depending on their NTE scores. In Newman, 2% of the white teachers in the district were denied pay raises based on their classification, while 38.6% of the black teachers received no raise.[237] Studies in the South Carolina case indicated that 90% of the white teachers in the state, and only 27% of the black teachers, would qualify for the top two salary classifications.[238] The court in the latter case also considered the use of the NTE for screening prospective teachers, and found that the minimum score required for initial certification eliminated approximately 41% of the graduates of "predominantly black" colleges and less than 1% of the graduates of "predominantly white" colleges.[239]

In *York v. Alabama State Board of Education*, the court considered the use of the NTE by the Mobile County School System to determine which nontenured teachers should be reemployed. Of 77 nontenured teachers denied reemployment because of the test requirement, 51 (66-67%) were

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235. 462 F.2d 1112, 1113 (5th Cir. 1972).

236. During the first year of the NTE's use in the merit pay program, 20% of the black teachers tested achieved the minimum score compared to 96% of the white teachers. In the second year, the percentages were 14% and 87%, respectively, and in the third year, 53% of the black teachers and 95% of the white teachers met the merit pay standard. *Id.* at 1114. The school district's knowledge of this disparate impact in the merit pay program supported the court's finding that a discriminatory purpose motivated the district's use of the NTE for retention of new teachers. *See id.*

237. 651 F.2d 222, 224 (4th Cir. 1981).

238. 445 F. Supp. 1094, 1102 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

239. *Id.* at 1101.

black and 26 (33-34%) were white, despite the fact that only 36-39% of the total teacher population in the system was black.[240]

Similar racially disproportionate effects have been noted with respect to other educational tests. In *Armstead v. Starkville Municipal Separate School District*, the school district dismissed 25 teachers for failure to attain a minimum score on the Graduate Record Examination. Sixteen of those teachers were black and nine were white, even though nearly 70% of the teachers in the system at the time were white.[241] In *Debra P. v. Turlington*, the student competency testing case, "[t]he failure rate among black students was approximately 10 times that among white students."[242]

One can readily see from the above cases that minority teachers may have legitimate title VII claims against teacher testing programs based on a disparate impact theory. Their first hurdle in such a case, of course, would be to show that the test truly does impact disproportionately on nonwhites. While there is no precise definition of what constitutes "disparate impact," the Supreme Court in *Griggs v. Duke Power Company* suggested that a test that disqualifies minority applicants "at a substantially higher rate than white applicants" is susceptible to a title VII challenge.[243] The Equal Employment Opportunity Commission has adopted a benchmark called the "four-fifths rule: "A selection rate for any race, sex, or ethnic group which is less than four- fifths. . . (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. . . ."[244] In other words, if the pass rate on a competency test for a minority group is less than 80% of the pass rate for whites, the test will be suspect. Though the four-fifths rule is just a guide, it has been acknowledged by the United States Supreme Court and other courts in title VII cases.[245]

b. Job Relatedness

If the statistics in past teacher testing cases are any indication, many competency tests may be vulnerable under a four-fifths rule or some similar standard. Proof of a disparate impact, however does not establish a title VII violation. It simply shifts the burden to the employer to justify its use of the challenged employment practice (here, the competency test) by showing that it is related to job performance. This is the issue that will be most critical in a title VII challenge to a teacher testing program. Unfortunately,

240. 581 F. Supp. 779, 784 (M.D. Ala. 1983).

241. 461 F.2d 276, 278 (5th Cir. 1972).

242. 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981).

243. 401 U.S. 424, 426 (1971).

244. 29 C.F.R. §1607.4(D) (1989).

245. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 779, 87 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

the law in this area currently is in a state of flux. In the past, the employer's burden was significant, but a recent Supreme Court opinion appears to have eased that burden. In response, Congress currently is considering legislation that would shift the balance once again toward the employee.

The disparate impact theory has its roots in *Griggs v. Duke Power Co.*, a case in which the Supreme Court declared that title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[246] In addressing the employer's defense in a title VII action, the Court stated: "The touchstone is business necessity. If an employment practice which operates to exlude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[247] The Court also addressed testing procedures in particular, suggesting that they could not be used "unless they are demonstrably a reasonable measure of job performance."[248]

In other employment discrimination cases in the 1970's, the Supreme Court elaborated on its *Griggs* analysis. With respect to the employer's burden, the Court stated in *Albemarle Paper Company v. Moody* that if the plaintiff established a prima facie case of discrimination—that is, showed a "disparate impact"—the employer then had "the burden of proving that its tests are job related."[249] The same standard was employed in *Dothard v. Rawlinson* two years later: "Once it is. . . shown that the employment standards are discriminatory in effect," the employer bears the burden of prov[ing] that the challenged requirements are job-related."[250]

After these cases, the courts settled into what seemingly was a well-established disparate impact analysis: the plaintiff had the burden of proving that the challenged employment practice had a disparate impact on minorities; once that prima facie case was established (generally through the use of statistics), the employer had the burden of proving the practice was related to job performance. In 1989, however, the Supreme Court revisited this issue and effected what is perceived by many to be a significant change in the law of employment discrimination. In *Wards Cove Packing Co. v. Atonio*, the Court stated that "the employer carries the burden of producing evidence of a business justification for [its] employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[251]

The lower court in *Wards Cove*, relying on the Supreme Court's earlier pronouncements in the area, believed that the burden of persuasion shifted

246. 401 U.S. at 431.
247. *Id.*
248. *Id.* at 436.
249. 422 U.S. 405, 425 (1975) (emphasis added).
250. 433 U.S. 321, 329 (1977).
251. 109 S. Ct. 2115, 2126 (1989).

to the employer once the plaintiff established a prima facie case of disparate impact. The Supreme Court conceded that "some of [its] earlier decisions can be read as suggesting" the correctness of that view. "But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production—but not persuasion—burden."[252] This analysis invoked a strong dissent by four justices, who accused the majority of infidelity to "a longstanding rule of law" and castigated the majority for its "latest sojourn into judicial activism."[253]

It is unnecessary to probe the fine distinctions between burdens of "persuasion" (or "proof") and burdens of "production." Suffice it to say that *Wards Cove* appears to have reduced the employer's burden from what many courts and legal scholars believed it to have been. Assuming the validity of this assumption, the decision has made it more difficult for plaintiffs to win discrimination suits. That conclusion seems to be supported by some of the Court's language. For example, the Court made it clear that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." Moreover, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[254]

The debate over the practical effect of *Wards Cove* may turn out to be moot if Congress and President Bush eventually reach some kind of agreement on new civil rights legislation. In October 1990 Congress passed the Civil Rights Act of 1990, which effectively reversed the effect of *Wards Cove* by placing the burden of proof of job relatedness squarely on the employer. President Bush, however, vetoed the legislation on the ground that it would force employers to use hiring quotas to avoid lawsuits.[255] On October 24, 1990, the Senate came up one vote short of the total necessary to override the President's veto.[256] Congress undoubtedly will try again and attempt to enact a new civil rights bill in 1991, but until it does, *Wards Cove* remains good law.

Regardless of the standards eventually adopted, employers still will have to justify the use of employment practices that impact disproportionately on minorities. In the teacher testing context, proving job relatedness is tantamount to proving test validity. In *Albemarle Paper Co. v. Moody*,[257] for example, the Supreme Court considered the use of a pre-employment

252. *Id.* (citation to *Dothard* omitted).
253. *See id.* at 2127-28 (Stevens, J., dissenting) (joined by Brennan, Marshall, and Blackmun).
254. *Id.* at 2125-26.
255. Wall St. J., Oct. 23, 1990, at A6, col. 1.
256. Wall St. J., Oct. 25, 1990, at ____, col. 1.
257. 422 U.S. 405 (1975).

testing program that had a disparate impact on black applicants. After noting that the employer had the burden of proving job relatedness, the Court focused on the employer's efforts to "validate" the job relatedness of its testing program. The Court offered a lengthy comparison of the defendant's validation study with the EEOC's Uniform Guidelines and concluded that the employer had not met its burden of proving job relatedness.[258]

Other courts considering title VII challenges to teacher testing programs have also explicitly equated job relatedness with test validity.[259] Even in the title VII context, then, the importance of the test validation issue cannot be overstated. Once again, the extent to which school officials will be able to use tests to evaluate teachers may depend on whether courts require serious validation efforts.

c. Availability of Alternative Measures

One final aspect of traditional title VII jurisprudence should be considered. Courts customarily have adhered to a three-part analysis in considering disparate impact claims. First, the plaintiff must show that the employer's use of competency tests has a disproportionate impact on minorities. The burden then shifts to the employer to show the tests are job related—that is, have been validated. "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'[260] Such a showing by the plaintiff would establish a title VII violation, on the theory that the existence of nondiscriminatory but equally viable selection methods is evidence that the employer selected its tests as a "pretext" for racial discrimination.[261]

This part of the title VII analysis apparently has not been changed by *Wards Cove*. The Supreme Court in that case stated that once a plaintiff establishes a prima facie case of disparate impact resulting from challenged employment practices,

> the case will shift to any business justification [defendants] offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications

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258. *See* id. at 425-36.

259. *See, e.g.*, York v. Alabama State Bd. of Educ., 581 F. Supp. 779, 785 (M.D. Ala. 1983); United States v. South Carolina, 445 F. Supp. 1094, 1112 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

260. *Albemarle Paper Co.*, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

261. *Albermarle Paper Co.*, 422 U.S. at 425.

> an employer offers for [its] use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact.[262]

The Court made it clear that the burden of persuasion with respect to alternatives falls on the plaintiff, and by its language the Court suggested that this will be a difficult burden to overcome. First, "any alternative practices [plaintiffs] offer up in this respect must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals."[263] Moreover, factors such as "the cost or other burdens" of proposed alternatives are to be considered in determining whether such alternatives will be "equally as effective." The Court capped its discussion by noting that employers generally are better equipped than courts to decide what employment practices will be appropriate and warning that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a title VII suit."[264]

It is possible, then, that a title VII plaintiff could prevail, even if school officials have properly validated their competency tests, by proffering some alternative method of measuring teacher competency which would have less of a racial impact. That result is unlikely, however, given the requirement that any alternative be "equally effective," the Supreme Court's clear deference to the decisions of employers, and the dearth of reliable measures of teacher competency. The real battle in a title VII suit would still appear to revolve around the job relatedness/test validation issue.

2. Discrimination Against Persons with Disabilities

In administering teacher competency tests, school officials must also be careful not to discriminate against teachers with disabilities that may affect their test performance. Statutory claims have been made against school districts based on section 504 of the Rehabilitation Act of 1973, which provides that "[n]o otherwise qualified individual with handicaps. . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[265]

Because most public schools do receive federal financial assistance, they are susceptible to challenges brought under this act. The most difficult issues in such a case generally are whether the plaintiff is "otherwise

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262. 109 S. Ct. at 2125.
263. *Id.* at 2127 (emphasis added).
264. *Id.*
265. 29 U.S.C. §794(a) (1988).

qualified" for the employment benefit sought (a particular position, promotion, salary increase, etc.), and whether the plaintiff was excluded solely on the basis of a handicap. In *Upshur v. Love*,[266] for example, a blind teacher brought suit under section 504 against his school district, alleging the district's unlawful discrimination in denying the teacher an administrative position. Applicants for such positions were evaluated in part on the basis of a written examination, and plaintiff, who had the assistance of a reader during administration of the exam, finished in the bottom 25% of the applicants who took the exam. Despite the plaintiff's contention that he was denied an administrative position solely because he was blind, the court concluded that his blindness was not the determinative factor in the district's decision: the plaintiff was not "otherwise qualified" for an administrative position, nor was he excluded from consideration solely because of his handicap.

In considering the "otherwise qualified" issue, school officials must realize that courts often construe section 504 to require employers to make some accommodations for persons with disabilities. "[W]hile [an employer] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[267] In the teacher testing context, such "reasonable accommodations" may have to include special testing procedures, such as additional time to take the exam, the use of readers to read the test questions to the test-taker, the use of computers, or perhaps even changes in test format.

A section 504 challenge has been made to the competency testing program in Texas by a dyslexic teacher who failed the TECAT.[268] While the court in that case held for the school district, other courts, and the United States Congress, are beginning to be more vigilant in protecting the rights of disabled persons. For example, in *Wynne v. Tufts University School of Medicine*,[269] the First Circuit considered a section 504 suit brought by a former medical student who was dismissed from medical school after he failed several first-year courses. The student learned after he completed his first year of school that he had dyslexia, which impaired his ability to answer multiple-choice questions. He claimed that the medical school's failure to offer an alternative to written multiple-choice examinations constituted discrimination in violation of section 504. The district court entered

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266. 474 F. Supp. 332 (N.D. Cal. 1979).

267. Alexander v. Choate, 469 U.S. 287, 300 (1985). *See also* School Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987) (Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee.").

268. Chapline v. Central Educ. Agency, No. A-86-CA-521 (W.D. Tex. Nov. 18, 1988).

269. ___ F.2d ___ (1st Cir. 4/30/90) [1990 Westlaw 52715].

judgment for the school, finding the plaintiff not "otherwise qualified" for the medical school program. The First Circuit, however, reversed, focusing on the "reasonable accommodations" requirement of section 504:

> [T]he ultimate question does not concern Wynne's ability to meet the requirements of Tufts Medical School as they now exist. The issue instead is whether there is a reasonable accommodation to Wynne's disability that can be made by Tufts so as to given him "meaningful access" to the medical education offered there.[270]

While the court said it subscribed to "the principle of deference to academic decision-making," it felt that Tufts "failed to prove. . . that retention of written multiple choice examinations is sufficiently basic to its medical school program that it may insist upon them to the detriment of dyslexic students like Wynne."[271] The court suggested that essay exams might meet the school's objectives just as well as multiple choice exams, and remanded the case for consideration of potential accommodations that could be made for students such as Wynne.

The Wynne case should raise the consciousness of educational policymakers considering the use of testing programs in the evaluation of teachers. An even more important development, however, is the recent enactment of the Americans with Disabilities Act of 1990,[272] signed into law by President Bush on July 26, 1990. Although the employment discrimination provisions of the act do not become effective until 24 months after the date of enactment, school officials should take heed of Congress's clear mandate for the elimination of discrimination against persons with disabilities.

The Americans with Disabilities Act applies to employers with 15 or more employees, so virtually all public school districts will be covered by its provisions. The act provides that no such employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Just as an intent to discriminate need not be proven to establish a violation of section 504 of the Rehabilitation Act of 1973,[273] the new act likewise reaches employment practices "that have the *effect* of discrimination on the basis of disability."

The act specifically addresses the issue of testing, making it clear that the failure to make reasonable accommodations in the testing process

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270. *Id.* at ___ .
271. *Id.* at ___ .
272. Pub. L. No. 101-336, 104 Stat. 327 (1990).
273. See Alexander v. Choate, 469 U.S. 287, 292-99 (1985).

may violate the law:

> [T]he term "discriminate" includes . . . failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

As a practical matter, the Americans with Disabilities Act may not impose any requirements on school officials that section 504 of the Rehabilitation Act does not already impose. The new act does, however, underscore a deep national concern over discrimination against persons with disabilities. Therefore, it should put school officials on clear notice that teacher evaluation practices that screen out disabled persons will be seriously scrutinized in the courts.

3. Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA)[274] protects individuals over the age of 40 from discrimination on the basis of age. While the Supreme Court has not specifically addressed the issue, the lower federal courts have uniformly assumed that a "disparate impact" analysis, similar to that used in title VII cases, is equally applicable to ADEA claims.[275] In other words, a plaintiff bringing an age discrimination suit need not prove the employer purposefully or intentionally discriminated against the plaintiff because of his or her age; it is enough to establish a prima facie case of age discrimination if the plaintiff can show that the employer's facially neutral actions had a signficant disproportionate impact on employees over 40 years of age.

There is at least one reported case in which an age discrimination claim was made against a teacher competency test, again involving the Texas testing program. In *Fields v. Hallsville Independent School District*,[276] two experienced teachers, one a 61-year-old black woman and the other a 59-year-old black woman, failed the TECAT and were terminated from their teaching positions. In their suit against the school district, they claimed

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274. 29 U.S.C. §§621-634 (1988).

275. See M. Player, E. Shoben & R. Lieberwitz, EMPLOYMENT DISCRIMINATION LAW 587 (1990) and cases cited therein.

276. 906 F.2d 1017 (5th Cir. 1990).

racial discrimination in violation of title VII and age discrimination in violation of the ADEA. Both claims were rejected by the court.

It seems unlikely that teacher testing programs will run afoul of the ADEA. Indeed, it may well be that teachers over 40, who generally have many years of teaching experience, will, as a group, perform better on competency exams than their younger colleagues. Much will depend, of course, on the type of exam that is used and the conditions surrounding the administration of the exam. School officials must remember that older teachers often are much further removed from the test-taking experience than younger teachers who have received their college degrees more recently. Care should be taken, then, to ensure that the competency exam is an accurate measure of one's competency to teach and not simply an evaluation of one's test-taking skills.

D. Miscellaneous Legal Considerations

A myriad of legal issues may be indirectly implicated by a teacher testing program. While it would be speculative to try to catalog all of the potential concerns, two recent cases provide an illustration of the kinds of legal issues school officials may face.

In *Troup County Board of Education v. Daniel*,[277] the Georgia Court of Appeals held that a teacher could receive unemployment compensation following her resignation after she failed the Georgia competency test three times. The teacher was entitled to the benefits even though she was free to take the exam several more times in an effort to pass.

An interesting case involving the Arkansas testing program also was decided recently. In *Mosley v. McGehee School District*,[278] a 60-year-old junior high school principal died of a heart attack the morning after taking the Arkansas Teacher Competency Test. His widow filed a worker's compensation claim, alleging that the stress and anxiety of taking the test caused her husband's death. The worker's compensation commission held that the principal's death was not job-related and denied benefits. On judicial review of that decision, however, the court reversed and remanded the case back to the commission for further fact findings regarding the cause of death.

277. 381 S.E.2d 586 (Ga. Ct. App. 1989).
278. 783 S.W.2d 871 (Ark. Ct. App. 1990).

VI.

Teacher Evaluation and Defamation

One of the unpleasant tasks school administrators face in the evaluation process is to report on the deficiencies of the teachers they are evaluating. Because this part of the process necessarily entails saying critical things about another person, administrators must be alert to the possibility of defamation claims being brought against them by teachers whose employment status may be affected by an adverse evaluation.

A significant number of cases have been decided in the last several years involving such defamation claims, both in higher education and at the elementary or secondary level. Though few teacher-plaintiffs have succeeded on a defamation theory, administrators should be aware of the legal standards by which libel and slander claims are judged.

Any oral (in the case of slander) or written (in the case of libel) communication to a third person which is injurious to the reputation of another is a candidate for a defamation claim. Thus, disparaging statements about a teacher's abilities or past performance may be defamatory, even if made during the process of evaluation.[279] Certainly allegations of incompetence can serve as a basis for a defamation action.[280] There are, however, several lines of defense available to an administrator in guarding against such claims.

A. Truth as a Defense

Both libel and slander are defined in terms of false statements that are injurious to the reputation of another.[281] Therefore, truth is always the first potential defense in a defamation suit.

In *Lindemuth v. Jefferson County School District R-1*,[282] for example, an assistant basketball coach brought a defamation action when he lost his job after a superior told various persons about plaintiff's past history of child molestation (14 years earlier, plaintiff had pled "no contest" to a charge of attempted assault on a child). The court rejected the plaintiff's claim, noting that the alleged defamatory statements were substantially true and "[s]ubstantial truth is an absolute defense to a defamation claim."[283] In a

279. *See, e.g.*, Williams v. School Dist. of Springfield R-12, 447 S.W.2d 256, 268 (Mo. 1969).

280. *See* Holland v. Kennedy, 548 So. 2d 982, 987 (Miss. 1989).

281. Black's Law Dictionary 824, 1244 (5th ed. 1979). *See also* Rosenthal v. Regents of Univ. of Cal., 269 Cal. Rptr. 788, 791 (Ct. App. 1990); Manguso v. Oceanside Unified School Dist., 153 Cal. App. 3d 574, 200 Cal. Rptr. 535, 538 n.4 (1984).

282. 765 P.2d 1057 (Colo. Ct. App. 1988).

283. *Id.* at 1058.

similar case, a physical education teacher who was terminated following accusations of child molestation lost his defamation suit in part because he could not refute the defendants' evidence that the disclosures were true.[284]

Another recent case, *Berlin v. Superintendent of Public Instruction*,[285] also highlights the importance of the truth or falsity issue. The plaintiff in that case was a supervisor in a special education program who was criticized for comments he made at a public hearing. He responded to the criticism with a defamation suit against various school officials. In rejecting the plaintiff's claim, the court noted that it was unlikely the comments he was objecting to would be deemed false.[286]

It is incumbent on school administrators, then, to check their facts carefully before making public disclosures which may impugn the reputations of teachers they are evaluating. If such disclosures are found to be substantially true, an administrator will be absolutely protected in a defamation action.

B. Privilege/Immunity

Even if statements made during the evaluation process are false, school administrators still will be entitled to some degree of protection in the form of a "privilege" or "immunity." The California Civil Code, for example, defines libel and slander as "false and unprivileged" communications.[287] The privilege issue, then, often is determinative in a teacher defamation suit. When does a privilege or immunity apply? Generally that will depend on the applicable defamation statutes or case law in the state where the suit is brought. Thus, it is important for school officials to have some understanding of the local law. Some states recognize a broad range of "privileged occasions,"[288] while other states provide more limited protection.

At least one court has found an absolute privilege when the alleged defamatory statements were made public at the invitation or request of the plaintiff. In *Williams v. School District of Springfield R-12*,[289] a teacher received notice that she would not be reemployed for the next school term. She appeared at a public meeting of the Board of Education and requested reasons for such action. In response to her request, the superintendent stated that her employment was being terminated because she "was insufficient and inadequate with her students, insubordinate, and ha[d] disobeyed

284. Bowman v. Parma Bd. of Educ., 44 Ohio App. 3d 169, 542 N.E.2d 663, 668 (1988).
285. 181 Mich. App. 154, 448 N.W.2d 764 (1989).
286. 448 N.W.2d at 768.
287. Cal. Civ. Code §§45-46 (West 1982) (emphasis added).
288. Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984).
289. 447 S.W.2d 256 (Mo. 1969).

school rules and regulations." The teacher countered with a slander suit against the superintendent. In rejecting her claim, the Supreme Court of Missouri held that the superintendent was absolutely protected because his remarks were made public at the request, and with the consent, of the plaintiff: "One who has invited or instigated the publication of defamatory words can not be heard to complain of the resulting damage to his reputation."[290]

Though this decision is now over 20 years old, it highlights the importance of the setting and circumstances under which defamatory statements are made. One recurrent theme in the defamation law of the various states is that an immunity or privilege applies only when the challenged statements are made in the course of one's employment. For example, in *Agins v. Darmstadter*,[291] a 1989 New York case in which a teacher brought a defamation suit against a superintendent for comments made to district personnel during an investigation into alleged misconduct by the teacher, the court held there could be no liability because the comments were made in the course of the superintendent's official duties. In *Berlin v. Superintendent of Public Instruction*, the court suggested a more restrictive approach under Michigan law: local school officials were entitled to immunity when acting in the course of their employment, but only when performing "discretionary," rather than ministerial, acts.[292]

In a related vein, state law often will restrict the privilege to communications between "interested" persons. In *Manguso v. Oceanside Unified School District*,[293] a superintendent prepared a letter evaluating a former teacher's performance. The letter was forwarded to the teacher's college placement file, where it was available to prospective employers. When the teacher discovered that the letter included unfavorable remarks, she brought a defamation action against the superintendent and the school district. The court held that the letter was not libelous because it "was written by an educator, regarding qualifications of a particular teacher and directed to those prospective employers of that teacher." As such, it was subject to a privilege under California law for communications "to a person interested therein . . . by one who is also interested."[294]

The "interested persons" notion appears to provide for an expansive application of privilege or immunity, one that may extend beyond administrators' statements during the course of a formal evaluation process. For

290. *Id.* at 267-69.
291. 153 A.D.2d 600, 544 N.Y.S.2d 635, 636 (1989).
292. 448 N.W.2d at 766.
293. 153 Cal. App. 3d 574, 200 Cal. Rptr. 535 (1984).
294. 200 Cal. Rptr. at 538 & n.3. *See also* Rosenthal v. Regents of Univ. of Cal., 269 Cal. Rptr. 788, 791 (Ct. App. 1990) (California Code protects communications as privileged if made between "interested" persons).

instance, a 1989 Michigan case involved a statement by a university student to a department chair that a faculty member assigned to the department had sexually assaulted her. The faculty member's later defamation claim against the student was rejected by the court on the basis of a state law privilege for communications on matters of "shared interest" between two parties.[295] Similarly, in *Nodar v. Galbreath*,[296] a high school teacher brought a slander action against the parent of a student for comments the parent made at a school board meeting regarding the teacher's performance. The Florida Supreme Court held that the parent's comments were privileged under Florida law based on both (1) a "mutuality of interest of speaker and listener," and (2) the fact that the comments were those of "a citizen to a political authority regarding matters of public concern."[297]

Neither of the above cases involves potential administrator liability, of course, because the alleged defamatory statements were made to the administrators by other interested persons. Nonetheless, they are important in the overall evaluation context because school officials often must rely on information gathered from others in making their evaluations of teachers. Administrators can take heart, then, in the fact that the scope of immunity generally is expansive and should encourage interested third persons to make full disclosure during the evaluation process.

C. Abuse of the Privilege/Malice

Though the scope of the privilege for defamation defendants may be broad, it is not unlimited. School officials must realize that in every state the privilege is conditional or qualified—that is, one is protected only if there is no abuse of the privilege. For example, in *Holland v. Kennedy*,[298] a college professor who was terminated brought a defamation action against the president of the college for statements made to the Board of Trustees regarding the "incompetence" of the professor. While the court recognized a qualified privileged for communications between persons "directly interested" in some matter, it also made clear that the privilege may be lost if the statements are made "outside the circle" of those persons with a legitimate and direct interest in the subject matter of the communications.[299]

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295. Rosenboom v. Vanek, 182 Mich. App. 112, 451 N.W.2d 520, 522 (1989), *appeal denied* (1990).
296. 462 So. 2d 803 (Fla. 1984).
297. *Id.* at 809-10.
298. 548 So. 2d 982 (Miss. 1989).
299. *Id.* at 987.

The most common type of privilege abuse, however, and often the key issue in many defamation cases, is malice on the part of the communicator. The states uniformly recognize that one is not protected from a defamation claim, even if a privilege appears applicable, if that person's statements were made with malice.

The definition of malice varies among different jurisdictions, but generally speaking, malice goes to the good faith of the person making the statements. In *Berlin*, the Michigan court specifically stated that local school officials were entitled to a qualified immunity only when acting "in good faith."[300] Similarly, the Mississippi court in *Holland* defined malice in terms of "bad faith."[301] A 1989 Maine case also provides a good example. In that case, a college teacher who was denied tenure sued a colleague for comments made to a tenure committee. The court noted that the defendant was entitled to a conditional privilege as long as there was no abuse of the privilege, such as speaking with a "malicious intent."[302]

These courts focused on the state of mind of the communicator, but the malice inquiry need not be so subjective. While a malicious intent to harm the reputation of the plaintiff probably would remove the privilege in every state, some states also recognize a more objective standard for determining whether a person has acted in good faith. The California law applied in *Manguso*, for example, permits a finding of malice if an administrator either (1) acts with "hatred or ill will" toward a teacher, or (2) "lack[s] reasonable grounds for believing the truth of the false statements."[303] Similarly, in *Bego v. Gordon*,[304] a 1987 case involving comments about a music teacher made by a superintendent in front of the teacher's class, the Supreme Court of South Dakota stated that "[i]n order to be privileged, a communication must be without malice." The court went on to define malice: "This qualified or conditional privilege may be lost when the speaker, on an otherwise privileged occasion, publishes false and defamatory matter concerning another which either (a) [the speaker] in fact does not believe to be true or (b) has no reasonable grounds for believing it to be true."[305]

The burden is on the plaintiff in a defamation case to show that the defendant acted with malice. As is suggested by the discussion above, the weight of the plaintiff's burden depends in part on the state's definition of malice. It may also depend on the legal status of the plaintiff—that is, whether

300. 448 N.W.2d at 766.
301. 548 So. 2d at 987.
302. Gautschi v. Maisel, 565 A.2d 1009, 1011 (Me. 1989).
303. 200 Cal. Rptr. at 539.
304. 407 N.W.2d 801 (S.D. 1987).
305. *Id.* at 811 (citing Gardner v. Hollifield, 97 Idaho 607, 549 P.2d 266, 269 (1976)).

the plaintiff is considered a "public figure" rather than simply a private individual.

In *New York Times v. Sullivan*,[306] the United States Supreme Court recognized a First Amendment constitutional privilege for persons making statements relating to the "official conduct" of a "public official." The Court has since extended that privilege to cases involving "public figures" engaged in activity of public concern, on the theory that persons in the public eye have voluntarily exposed themselves to a greater risk of injury from defamatory statements.[307]

The upshot of these cases is that a public official-or public figure-plaintiff bears a heavier burden of proof in a defamation case. The defendant's privilege in such a case is not absolute—it is still a qualified privilege—but the plaintiff faces a higher standard on the issue of malice. The *New York Times* decision prevents a public official from recovering damages unless it is shown that the defendant made the defamatory statement with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[308] The courts have made clear that this is a subjective test, going to the actual state of mind of the communicator rather than measuring the defendant's conduct by what a reasonable person would have done.[309]

All states are bound by the federal constitutional standard of *New York Times*, but some states may also have an even more restrictive definition of actual malice in their statutes. In *Manguso v. Oceanside Unified School District*, for example, the court addressed a California statute on actual malice which requires a plaintiff to prove that the defendant acted both out of "hatred or ill will" and (as opposed to "or," for malice generally) "without a good faith belief in the truth" of the statements.[310] Though the court in *Manguso* held that the actual malice statute did not apply to a teacher's suit against a school administrator,[311] the lesson again is to pay attention to the applicable state law on defamation.

The actual malice standard of New York Times will not apply, of course, unless the plaintiff is considered a public official or public figure.[312] In the teacher evaluation context, a key issue is whether a public school teacher falls within one of those categories. Unfortunately, that issue is unresolved.

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306. 376 U.S. 254 (1964).

307. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-64 (1967) (Warren, C.J., concurring).

308. 376 U.S. at 279-80.

309. *See, e.g.*, Luper v. Black Dispatch Publishing Co., 675 P.2d 1028, 1033 (Okla. Ct. App. 1983), *cert. denied* (1984).

310. 200 Cal. Rptr. at 539.

311. The court held that the statute provided a shield only for newspaper articles and radio broadcasts. *See id.*

312. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-47 (1974) (declining to extend *New York Times* standard to defamation actions brought by private individuals).

Some state courts have held that teachers are public officials or public figures (and therefore bear the heavier burden of proof on malice),[313] while others have held they are not.[314]

In summary, then, school administrators who are sued by teachers for defamatory statements made in the evaluation process will have greater protection if the teacher-plaintiff is deemed a "public figure" and therefore bears the burden of proving that the administrator acted with actual malice. Even without such protection, however, administrators will have the benefit of a qualified privilege and should be able to escape liability if they have acted reasonably and in good faith.

D. Fact v. Opinion

A final issue to consider is whether the communicator has made a statement of "fact" or a statement of "opinion." Traditionally, courts have held that opinions are protected, and that only statements of fact may serve as a basis for liability in a defamation suit. It is often difficult, however, to make a valid distinction between the two, so litigation often has revolved around this fact-opinion issue.

In the context of a teacher evaluation, it would seem that an administrator's critical comments about a teacher often could be reasonably characterized as a statement of either fact or opinion. For example, in *Goralski v. Pizzimenti*,[315] a substitute teacher was taken off a school substitute list because of "misconduct." Is that a statement of fact or opinion? The court in *Goralski* held that the teacher had no claim because the use of the term misconduct by school personnel "was mere opinion."[316]

The fact-opinion distinction also was critical to the court in *Rosenthal v. Regents of University of California*,[317] a 1990 decision involving a defamation suit by a university professor. The professor also was a department chair, and as such, was the subject of a report by a university committee evaluating the effectiveness of the department. The professor claimed

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313. *E.g.*, Bowman v. Parma Bd. of Educ., 44 Ohio App. 3d 169, 542 N.E.2d 663, 668 (1988) (public school teacher is public official); Luper v. Black Dispatch Publishing Co., 675 P.2d 1028, 1031 (Okla. Ct. App. 1983), *cert. denied* (1984); *see also* Stutzman v. Chicago Bd. of Educ., 171 Ill. App. 3d 670, 525 N.E.2d 903, 907 (*New York Times* applies in suit by principal), *appeal denied*, 535 N.E.2d 411 (1988); Walko v. Kean College, 235 N.J. Super. 139, 561 A.2d 680, 686-87 (1988) (college teacher or administrator can be public figure); Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699, 704 (1986) (superintendent is public official).

314. *E.g.*, Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) (high school English teacher is not public official); *see also* Staheli v. Smith, 548 So. 2d 1299, 1304-05 (Miss. 1989) (state university professor is not public figure).

315. 115 Pa. Commw. Ct. 210, 540 A.2d 595 (1988).

316. 540 A.2d at 598-99.

317. 269 Cal. Rptr. 788 (Ct. App. 1990).

certain statements in the report defamed him, but the trial court found for the defendants on the basis of a privilege. On appeal, the California Court of Appeals specifically addressed the fact v. opinion issue, concluding that the plaintiff's claim was nonactionable because the statements in the report were opinions of the reviewing committee.[318]

The United States Supreme Court recently recognized the difficulty in distinguishing between fact statements and expressions of opinion. In *Milkovich v. Lorain Journal Co.*,[319] a decision which may have a significant impact on the way defamation suits are tried, the Court explicitly rejected "a wholesale defamation exemption for anything that might be labeled 'opinion.' " The Court asserted that the lower courts had misinterpreted its earlier precedent, creating "an artificial dichotomy between 'opinion' and 'fact' and "ignor[ing] the fact that expressions of 'opinion' may often imply an assertion of objective fact."[320]

On its face, *Milkovich* would seem to make it easier for plaintiffs to prevail on a defamation claim. Certainly the decision eliminates as a defense the bare assertion that the defendant was expressing "only an opinion." The Court did make clear, however, that a statement can be actionable only if it is capable of being proved false: "a statement of opinion . . . which does not contain a provably false factual connotation will receive full constitutional protection."[321]

It is likely that the Supreme Court's "provable as false" language will be adopted as the new standard in this area. Whether this will significantly affect the results of defamation suits remains to be seen. Justice Brennan, in a dissenting opinion in *Milkovich*, agreed with the majority's rejection of a strict fact-opinion dichotomy, but suggested that the lower courts would still analyze the issue by "the same indicia [they] have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made."[322]

A final note: *Milkovich* involved a newspaper defendant, and the Court reserved judgment on whether its new standard applied to cases involving nonmedia defendants.[323] School administrators should assume the standard does apply to them, and they should not rely on the kind of fact-opinion distinction courts have employed in the past. Administrators should further assume that any critical statements they make about teachers they are

318. *Id.* at 792-93.
319. 110 S. Ct. 2695 (1990).
320. *Id.* at 2705-06.
321. *Id.* at 2706 (emphasis added).
322. *Id.* at 2709 (Brennan, J., dissenting).
323. *Id.* at 2706 n.6.

evaluating may be construed as fact statements which are fully actionable in a defamation suit. The result, then, is that administrators will have to rely on a privilege defense and an absence of malice to avoid liability.

E. Conclusion Regarding Defamation

An increasing number of cases have been brought in the last several years by teachers who feel they have been defamed by school administrators, either in the process of a formal evaluation or under circumstances relating at least indirectly to teacher evaluation. Few such plaintiffs have prevailed, however, and it is not likely that many will succeed in the future.

While the Supreme Court's recent *Milkovich* decision may have signaled a slight shift in the balance toward plaintiffs on the fact-opinion issue, it did nothing to undermine the other defenses available to a defamation defendant. As a result, the law still seems stacked in favor of administrator-defendants. Truth is always a defense, and even if administrators' statements are false, if they have acted in good faith, by making a reasonable inquiry into the facts and acting out of legitimate administrative motives rather than ill will toward particular teachers, they will be protected.

Table of Cases

Agins v. Darmstadter/71
Allen v. Alabama State Board of Education/57
Allen v. Wright/37
Alba v. Los Angeles Unified School District/49, 57
Albermarle Paper Co. v. Moody/36, 61, 62
Alexander v. Choate/65, 66
Andrews v. Drew Municipal Separate School District/23
Arlington Heights v. Metropolitan Hous. Dev. Corp./57
Armstead v. Starkville Municipal Separate School District/34, 55, 60
Avery v. Homewood City Board of Education/23
Baker v. Columbus Municipal Separate School District/57, 59
Balog v. McKeesport Area School District/19
Bego v. Gordon/73
Berlin v. Superintendent of Public Instruction/70, 71
Bethel Park School District v. Krall/20
Bishop v. Wood/45
Board of Directors of Sioux City v. Mroz/15
Board of Education v. Pico/19
Board of Education of Alamogordo Public School District v. Jennings/22
Board of Education of City of Chicago v. Box/30
Board of Education of School District No. 131 v. Illinois State Board of Education/31
Board of Education of Tonica Community High School v. Sickley/23
Board of Regents v. Roth/44
Bowman v. Parma Board of Education/70, 75
Carmody v. Board of Directors of Riverside/17
Chapline v. Central Education Agency/65
Chicago Board of Education v. Illinois State Board of Education/31
City of Cleburne, Texas v. Cleburne Living Center/54
Cleveland Board of Education v. Loudermill/46
Community Unit School District No. 60 v. Maclin/16
Connecticut v. Teal/60
Connecticut Education Association, Inc. v. Tirozzi/43, 47, 53
Connick v. Myers/6
CTA v. Governing Board of Livingston Un. School District/16
Curtis Publishing Co. v. Butts/74
deOliveira v. State Board of Education/32
Debra P. v. Turlington/48, 49, 53, 60
Department of Education v. Kitchens/51
Dickeson v. Quarberg/45
Dodge v. Board of Education/41
Dohanic v. Department of Education/20
Dothard v. Rawlinson/61, 63
Eckmann v. Board of Education of Hawthorn School District/23
Energy Reserves Group, Inc. v. Kansas Power & Light Co./39, 42
Eshom v. Board of Education of School District No. 54/28
Ferrera v. Mills/7
Fields v. Hallsville Independent School District/67
Garcia v. State Board of Education/21
Gardner v. Hollifield/73
Gautschi v. Maisel/73
Georgia Association of Educators, Inc. v. Nix/34, 55
Gertz v. Robert Welch, Inc./74
Gillespie v. Wisconsin/39
Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622/31
Goetz v. Windsor Cent. School District/45

Goodrich v. Newport News School Board/27
Goralski v. Pizzimenti/75
Griggs v. Duke Power Co./35, 60, 61
Guardians Association v. Civil Serv. Comm'n/60
Harrah Independent School District v. Martin/52
Hickman v. Valley Local School District Board of Education/8
Hinkle v. Christensen/9
Holland v. Board of Education of Raleigh County, West Virginia/4, 28
Holland v. Kennedy/69, 72
Hollingsworth v. Board of Education/14
Hyde v. Wellpinit School District/3
Indiana *ex rel.* Anderson v. Brand/41
Jones v. Jefferson Parish School Board/18
Kadrmas v. Dickinson Public Schools/56
Keating v. Riverside Board of School Directors/21
Keystone Bituminous Coal Association v. DeBenedictis/42
Kimble v. Worth County R-III Board of Education/20
Knapp v. Whitaker/7
Kudasik v. Board of Directors/18
Lee v. Western Reserve Psychiatric Habilitation Center/45
Lindemuth v. Jefferson County School District R-1/69
Love v. Special School District of St. Louis County/5
Luper v. Black Dispatch Publishing Co./74, 75
Manguso v. Oceanside Unified School District/69, 71, 74
Mathews v. Eldridge/51
McDonnell Douglas Corp. v. Green/63
Melrose Municipal School Board of Education v. State Board of Education/21
Milkovich v. Lorain Journal Co./76
Monteith v. Board of Education/32
Montgomery v. Trinity Independent School District/9
Moore v. Tangipahoa Parish School Board/37
Morrissey v. Brewer/44
Mosley v. McGehee School District/68
Mott v. Endicott School Dist. No. 308/30
Mt. Healthy City School District v. Doyle/6
Munger v. Jesup Community School District/14
National Gay Task Force v. Board of Education of City of Oklahoma/23
New York Times v. Sullivan/74
Newman v. Crews/38, 53, 59
Nicholson v. Board of Education/25
Nodar v. Galbreath/70, 72, 75
Perry v. Sindermann/45, 46
Pickering v. Board of Education/5
Reichert v. Draud/9
Rogers v. Department of Defense Dependents Schools/4
Rosenboom v. Vanek/72
Rosenthal v. Regents of Univ. of California/69, 71, 75
Rowland v. Mad River School District/21
Scheelhaase v. Woodbury Cent. Community School District/10
School Board v. Arline/65
School Comm. of Brockton v. Teachers' Retirement Board/14
Schulz v. Board of Education of Fremont/17
Scott v. News-Herald/75
Scott County School District v. Dietrich/14
Simmons v. Vancouver School District No. 37/25
St. Louis Teachers Union v. St. Louis Board of Education/11
Staheli v. Smith/75
State v. Project Principle, Inc./40
Stutzman v. Chicago Board of Education/75
Sutherby v. Gobles Board of Education/24
Texas State Teachers Association v. State/40, 49
Thompson v. Board of Education/25
Thompson v. School District of Omaha/15

Tomczik v. State Tenure Comm'n/26
Trimboli v. Board of Education of Wayne County/29
Troup County Board of Education v. Daniel/68
Trustees, Missoula City School District v. Anderson/17
Tyler v. Hot Springs School District No. 6/29
United States v. South Carolina/36, 38, 53, 59, 63
Upshur v. Love/65
Walko v. Kean College/75
Wards Cove Packing Co. v. Atonio/58, 61
Ware v. Morgan City School District/25
Washington v. Davis/36, 56
Whaley v. Anoka-Hennepin Independent School District/11
Williams v. School District of Springfield R-12/69, 70
Wynne v. Tufts University School of Medicine/65
York v. Alabama State Board of Education/38, 59, 63